83-726

No. 83-

In The

Supreme Court of the United States

October Term, 1983

FIRST AMERICAN TITLE COMPANY OF SOUTH DAKOTA and FIRST AMERICAN TITLE INSURANCE COMPANY OF SOUTH DAKOTA,

Petitioners,

vs.

SOUTH DAKOTA LAND TITLE ASSOCIATION, SOUTH DAKOTA ABSTRACTERS' BOARD OF EXAMINERS, BLACK HILLS LAND AND ABSTRACT COMPANY, DENNIS O. MURRAY, SECURITY LAND AND ABSTRACT COMPANY, ESTATE OF GLEN M. RHODES, FALL RIVER COUNTY ABSTRACT COMPANY, CHARLES E. CLAY, CUSTER TITLE COMPANY, BETTY J. GOULD, HAAKON COUNTY ABSTRACT COMPANY, KEITH EMERSON, WAYNE ROE, CHARLES NASS, and STATE OF SOUTH DAKOTA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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November 1, 1983

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QUESTIONS PRESENTED

1. What action must be taken by a state legislature for antitrust immunity to attach to anticompetitive regulations of a state agency?

2. Whether state action immunity exempts from antitrust attack the regulations of a state agency preventing Petitioners from conducting their abstracting and title insurance business throughout the State of South Dakota, where the South Dakota legislature has never stated an intention to displace state-wide competition in the title services business?

PARTIES TO THE PROCEEDINGS

Petitioner First American Title Company of South Dakota is a company organized and doing business under the laws of South Dakota. It acts as a local agent for a foreign title insurance company, First American Title Insurance Company of California. It is also a licensed abstract company providing abstract services in Pennington County, South Dakota. Petitioner First American Title Insurance Company of South Dakota was a domestic South Dakota title insurance company organized pursuant to South Dakota law in June 1978. It was voluntarily dissolved in May 1980.

The Respondents include the South Dakota Land Title Association ("SDLTA"), a trade association composed of South Dakota abstracters, the South Dakota Abstracters' Board of Examiners ("SDABE"), an agency of the State of South Dakota, and various individuals and entities engaged in the abstracting business within the state. These individuals and entities consist of Dennis O. Murray, a South Dakota abstracter, President of Respondent Black Hills Land and Abstract Company, and a member of the SDLTA; Glen M. Rhodes, now deceased, who at the time of trial was a South Dakota abstracter, President of Respondent Security Land and Abstract Company, member of the SDABE and former President of the SDLTA, and whose estate has been substituted for him as a party; Charles E. Clay, a South Dakota abstracter, the owner and operator of Respondent Fall River County Abstract Company, and a member of the SDLTA; Betty J. Gould, a licensed abstracter, President of Respondent Custer Title Company, and a member of the SDLTA; Keith Emerson,

a licensed abstracter, a co-owner of Respondent Haakon County Abstract Company, and a member of the SDLTA; Wayne Roe, a licensed abstracter, and a member and President of the SDLTA at the time of trial; and Charles Nass, Secretary-Treasurer of the SDLTA through the pendency of the action, and the owner and operator of an abstract company in Brookings, South Dakota.

After the commencement of the action, the SDABE moved that the State of South Dakota be joined as a Respondent in the action, which motion was granted without objection of any party.

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No. 83-

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners First American Title Company of South Dakota and First American Title Insurance Company of South Dakota respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals entered August 11, 1983.

OPINIONS BELOW

The Court of Appeals decision has not yet been reported in the Federal Reporter, but it does appear at

1983-2 Trade Reg. Rep. (CCH) ¶ 65,539 (8th Cir. 1983), and is set forth in Appendix A, *infra*. The opinion of the District Court is reported at 541 F. Supp. 1147 (D.S.D. 1982), 1982-2 Trade Reg. Rep. (CCH) ¶ 64,849, and is set forth in Appendix B, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1983. (Appendix A.) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, as amended:

Section 1 (15 U.S.C. § 1):

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Section 2 (15 U.S.C. § 2):

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

STATEMENT OF THE CASE

This is a case involving a South Dakota state agency which governs the business of land title abstracting in that state, and which consists principally of licensed South Dakota abstracters. The agency, the SDABE, enacted regulations which have prevented Petitioners from conducting their abstracting and title insurance businesses throughout the state, outside of Pennington County, South Dakota. The issues raised in this Petition are limited to whether these regulations which effectively prohibit Petitioners from conducting their abstracting and title insurance businesses outside of one county in South Dakota are immune from antitrust attack under the state action immunity exemption, where the South Dakota Legislature has never indicated an intention to displace statewide competition in the title services industry.

Factual Background

The facts essential to the questions presented for review are not in dispute.

A. *Pertinent State Statutes*

The SDABE is authorized to "carry out the purposes and enforce the provisions of" the statutes governing abstracting and to "make such rules and regulations as may be necessary to carry out the purposes of those statutes, . . ." SDCL § 36-13-6. That agency consists of four members appointed by the Governor. Prior to 1980, three of the members of the board had to be licensed abstracters who had been recommended for such appointment by the Respondent trade association SDLTA within one year prior to the date of their appointment. SDCL § 36-13-1.

Beginning July 1, 1980, two of the four abstracters on the board must be members of the SDLTA, SDCL § 36-13-1, as amended by S. L. 1980 ch. 378.

South Dakota statutes govern the business of abstracting and title insurance within the state. Until July 1, 1979, South Dakota required that no foreign insurance company could issue a title insurance policy on property in South Dakota unless the policy was countersigned by a licensed abstracter who was doing business in the country where the property was located. SDCL § 58-25-16. Effective July 1, 1979, § 58-25-16 was amended to delete the word "foreign", thus extending the countersignature requirement to all title insurance policies, whether such policies are issued by a foreign or domestic insurance company.

In 1980, the South Dakota legislature enacted SDCL § 36-13-26.1, which states that "[a]n abstracter's countersignature on a title insurance policy is verification that the abstracter has furnished the insurer a report based on the examination of record title and any other title information and services required by the insurer and § 36-13-25".

In order to do business in a particular county in South Dakota, an abstracter, among other requirements, must have an approved abstract plant showing "in a sufficiently comprehensive form, all instruments affecting the title to real estate which are of record or on file in the office of the register of deeds", which is the county clerk and recorder's office. SDCL § 36-13-10.

B. *Pertinent SDABE Regulations*

Regulations adopted by the SDABE, purportedly pursuant to statutory authority noted above, taken together, prevent Petitioners from providing title services statewide in South Dakota. These regulations are as follows:

1. To countersign a title insurance policy, an abstracter must have a private abstract plant in the South Dakota county in which the property is located. ARSD § 20:36:07:02*;

2. The abstracter must search the conveyance records in the abstracter's own plant, as well as in the public county register of deeds records. ARSD § 20:36:07:01**; and

3. For an individual who is already licensed as a skilled abstracter in South Dakota to develop his or her

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*ARSD § 20:36:07:02.

Title search requirements.

The title search required for a commitment for or policy of title insurance shall be made under the direction of an abstracter licensed in the county in which the property is located, who shall countersign the title insurance policy pursuant to SDCL 58-25-16.

The results of the search shall be forwarded to the agent or company that is to issue the policy in the same order of business as is normally conducted by the abstracter. Delays in the search or reporting shall be cause for complaint and disciplinary proceedings by the abstracters' board of examiners.

**ARSD § 20:36:07:01.

Title search required for countersignature.

An abstracter shall search the records contained in the abstracter's plant and in the courthouse which relate to the property being insured before he countersigns a policy of or commitment for title insurance pursuant to SDCL 58-25-16.

own abstract plant in a county, the abstracter must go through the prohibitively expensive and laborious process of constructing the plant from an actual check of each page of each book of recorded instruments in the county register of deeds office, and in no case is the use of a copy or film of the numerical index in the register's office acceptable for the creation of a plant. ARSD § 20:36:04:01***.

As two of the Respondents, Black Hills Land and Abstract Company and Dennis O. Murray, conceded at page 4 of their appellate brief:

> There is little competition among South Dakota abstracters. There are about 70-72 abstract businesses in the state. . . . The four or five most populous counties in the state have two abstract firms. The rest of the state's abstracters have monopolies in their respective counties. . . .
>
> This pattern of county-wide abstract companies developed primarily because of the nature of the abstracting business in the State of South Dakota. . . .

***ARSD § 20:36:04:01.

General requirement for books, records, and indexes.

Before any person, firm, or corporation shall be entitled to a certificate of registration to engage in abstracting under the laws of South Dakota, he shall have an approved abstract plant containing the following:

(1) A complete index showing every instrument recorded in the register of deeds office in the county wherein he proposes to operate, properly listed against the specific property which it affects, and also a separate index showing all recorded instruments which do not affect specific property. This index may be compiled on cards, in bound books, or in loose leaf form, but must be made from an actual check of each page of each book of recorded instruments in said office, and in no case will a copy or film of the numerical index in the register's office be accepted.

The Eighth Circuit, too, recognized this "current situation in South Dakota in which most counties have only one licensed abstracter, except for the more populated counties, which have two." (App. A, p. App. 5).

C. *Petitioners' Dilemma*

First American Title Company of South Dakota was formed in 1974 by Walter J. Linderman, a licensed abstracter in Pennington County, South Dakota (App. A, p. App. 5). First American Title Company of South Dakota served as a local agent for a foreign title insurance company First American Title Insurance Company of California (App. A, p. App. 5). In his dual capacity as abstracter and title insurance agent, Mr. Linderman was qualified to countersign title insurance policies on property located in Pennington County; but when insuring title on property outside of Pennington County, he was required to obtain the countersignature of that county's licensed abstracter and pay the resulting fee due to South Dakota statutes and SDABE regulations (App. A, p. App. 5).

Mr. Linderman also formed First American Insurance in December 1978 to avoid the requirement in SDCL § 58-25-16 which did not require domestic title insurance companies to obtain countersignatures from abstracters on title insurance policies (App. A, pp. App. 5-6). The law as written at that time enabled Mr. Linderman to issue title insurance policies on property in any South Dakota county without obtaining a countersignature from that county's licensed abstracter.

The SDABE, the SDLTA and their members lobbied the South Dakota legislature to amend SDCL § 58-25-16 to delete the word "foreign" thereby imposing the coun-

tersignature requirement upon domestic title insurance companies as well as such foreign companies (App. A, pp. App. 6, 13-14). As a result of the amendment, as well as the SDABE regulations challenged here, Petitioners were prohibited from countersigning their own title insurance policies or those of their out-of-state principal without obtaining a countersignature from abstracters outside of Pennington County, South Dakota (App. A, p. App. 5).

D. *Litigation Background*

This antitrust action concerned alleged anti-competitive regulatory and private restraints on the South Dakota abstracting and title insurance businesses. Petitioners contended below that they were the victims of a price fixing conspiracy, frivolous and sham litigation, a conspiracy to devise and enforce statutes and regulations which serve to restrain trade in the abstracting and title insurance businesses, all in violation of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2. The Respondents (with the exception of the State of South Dakota) were all alleged to be part of the conspiracy.

Following a bifurcated bench trial on the issue of liability, the district court entered judgment for defendants. The court found there was insufficient evidence to support a conclusion that a private price-fixing conspiracy existed among defendant abstracters and their title companies. The court further concluded that plaintiffs' remaining antitrust claims were barred by the McCarran-Ferguson Act, 15 U. S. C. §§ 1011-1015, the *Noerr-Pennington* doctrine and the state action anti-trust exemption first enunciated in *Parker v. Brown*, 317 U. S. 341 (1943). The Eighth Circuit affirmed. The questions presented here

relate only to one portion of the case as tried, decided upon and appealed below.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit in its opinion below recognized that there is a fundamental difference between it and the Ninth and Fifth Circuits regarding what constitutes state legislative displacement of competition so as to immunize state agency action from the federal antitrust laws. The Eighth Circuit stated:

> First American relies on cases from the Ninth and Fifth Circuits in arguing that the challenged regulations were not compelled by the South Dakota legislature, thus they are not entitled to state action immunity. *Ronwin v. State Bar of Arizona*, 686 F. 2d 692 (9th Cir. 1981), *cert. granted*, 51 U. S. L.W. 3825 (May 16, 1983) (No. 82-1474); *United States v. Texas State Board of Accountancy*, 464 F. Supp. 400 (W. D. Tex. 1978), *modified*, 592 F. 2d 919 (5th Cir.) *cert. denied*, 444 U. S. 925 (1979). Our above discussion should indicate, however, that we are in fundamental disagreement with our brethren in these circuits regarding application of the state action doctrine to state agencies or subdivisions. In both these cases, the courts cast the inquiry in mandatory terms — whether the challenged action by the state agency was compelled by the state legislature. In both cases there were vigorous dissents putting forth the view adhered to by this circuit: "that an adequate state mandate for anti-competitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" *City of Lafayette* [*v. Louisiana Power & Light Co.*], 435 U. S. at 415.

(App. A, pp. App. 32-33). This case would be an excellent companion case to *Ronwin v. State Bar of Arizona*, 686 F. 2d 692 (9th Cir. 1981), *cert. granted sub nom., Hoover v. Ronwin*, 103 S. Ct. 2084, 77 L. Ed. 2d 296 (1983), which this Court has agreed to hear, and the holding of which the Eighth Circuit is in fundamental disagreement. Petitioners here, of course, are in agreement in the *Ronwin* analysis of the limited cloak of antitrust immunity afforded state agencies.

In a nutshell, the problem of the regulations of Respondent SDABE is as follows:

1. A title insurance company, such as Petitioner First American Title Company of South Dakota, cannot issue a title policy on real property in South Dakota without an abstracter's countersignature. SDCL § 58-25-16. (Prior to the 1979 Amendment, SL 1979, CH. 345, the countersignature requirement applied only to title insurance policies issued by out-of-state title insurance companies);

2. To countersign a title insurance policy, a licensed abstracter in South Dakota must have a private abstract plant in the county in which the property is located. ARSD § 20:36:07:02;

3. An abstracter must search the conveyance records in the abstracter's own plant in the county, as well as in the county register of deeds records. ARSD § 20:36:07:01; and

4. In order for an individual already licensed as a skilled abstracter in South Dakota to develop his or her own abstract plant in a county, the abstracter must go through the prohibitively expensive and laborious process of constructing the plant from an actual check of each page

of each book of recorded instruments in the county register of deeds office, and in no case is the use of a copy or film of the numerical index in the register's office acceptable for the creation of such a plant. ARSD § 20:36:04:01.

The cumulative effect of these regulations is to prohibit new entrants into a county to provide title services. An abstracter such as First American Title Company of South Dakota cannot countersign title policies outside of the county where it maintains a licensed abstract plant, even though it has qualified personnel and even though there is no statutory requirement for an abstracter to search a private abstract plant in order to provide a countersignature; an abstract company cannot construct an authorized abstract plant in a county so that it can do business there without engaging in the extremely costly process of recreating all records in the county register of deeds office. This is a prohibitively expensive process, and as time goes on, ever more expensive because of additional documents resulting from the continually growing history of conveyances. It has the effect of giving existing abstracters monopoly power over title services within their respective counties; and a title company must obtain a countersignature from a local abstracter regardless of how thoroughly and competently it does its own title search of the county register of deeds records, regardless of whether it engages an abstracter in another county to act as an agent to do the necessary title work, and regardless of how much or how little work, if any, was done by the abstracter who provides the countersignature. Effective competition in the title services business in South Dakota is thereby stifled by the SDABE.

The regulations relating to the countersignature law and the regulations which require the laborious construc-

tion of an abstract plant and the countersigning of title policies by local abstracters only, ARSD §§ 20:36:04:01, 20:36:07:01, and 20:36:07:02, are pre-empted to the extent that Petitioners must obtain countersignatures from other licensed abstracters. *California Retail Liquor Dealers' Association v. Mid-Cal Aluminum, Inc.*, 445 U. S. 97 (1980); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951); *United States v. Texas State Board of Public Accountancy*, 464 F. Supp. 400 (W. D. Tex. 1978), *modified*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979).

In *Mid-Cal*, the Supreme Court held that a California retail price maintenance system affecting all wine producers and wholesalers within the state was not entitled to exemption from the antitrust laws. That decision established two standards for antitrust immunity under *Parker v. Brown*, 317 U. S. 341 (1943). First, the challenged restraint must be "clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the state itself. This standard was recently affirmed in *Community Communications Co., Inc. v. City of Boulder, Colorado*, 455 U. S. 40 (1982). The price maintenance system at issue in *Mid-Cal* was denied exempt status because it failed to satisfy the "active state supervision". In the *City of Boulder* case, this court held that Boulder's moratorium ordinance relating to cable television construction did not satisfy the "clear articulation and affirmative expression" criterion by a political subdivision, thereby making the county ordinance subject to antitrust scrutiny.

In the *Texas State Board of Public Accountancy* case, that agency promulgated a rule prohibiting competitive

bidding among accountants. The District Court and the Fifth Circuit both found that the prohibition violated Section 1 of the Sherman Act. The District Court used and the Fifth Circuit affirmed the following language:

> Defendant relies upon the case of *Parker v. Brown*, 317 U. S. 338, 63 S. Ct. 307, 87 L. Ed. 315 (1943), as authority for its assertion that it is immune from the provisions of the Sherman Act. Following the recent ruling of the Supreme Court in *City of Lafayette v. La. Power & Light Co.*, [435 U. S. 389 (1978)], this Court concludes that, "the *Parker* doctrine exempts only anti-competitive conduct engaged in as an act of government by the state as sovereign, or, by subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." 435 U. S. 389, 413, 98 S. Ct. 1123, 1137, 55 L. Ed. 2d 364 (1978). In this case, Rule 14 [prohibiting competitive bidding by accountants] is not mandated by any state regulation or action. Section 5 of the Accountancy Act [providing that the Texas State Board of Public Accountancy "promulgate and may amend from time to time, Rules of Professional Conduct appropriate to establish and maintain a high standard of integrity in the profession of public accountancy. . . ."] is cast in permissive, not mandatory, language, and, furthermore, only allows adoption of rules appropriate for maintenance of high public standards of integrity in the Accountancy profession. Nowhere in the Act does the State as sovereign mandate the anti-competitive conduct required by Rule 14, nor is such policy dictated by the State. Additionally, it cannot be said that Section 5 of the Act in any way concerns or contemplates "the kind of action complained of" here. 435 U. S. 389, 415, 98 S. Ct. 1123, 1138, 55 L. Ed. 2d 364 (1978).

464 F. Supp. at 403-04.

In *Ronwin, supra*, the Ninth Circuit reversed the district court's dismissal of an antitrust claim against mem-

bers of the Arizona State Bar Committee on Examinations and Admissions of the Arizona Supreme Court by an unsuccessful applicant. The Court in refusing to give that committee blanket state action antitrust immunity stated:

> The fact that the Arizona Supreme Court has delegated to the Committee the general authority to examine applicants to determine if they are qualified to practice law and reviews the Committee's recommendations regarding admission does not alone clothe the Committee's unilateral grading policies with blanket immunity from the antitrust laws. "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement" over actions of the Committee that were not affirmatively expressed as state policy by the Arizona court. *Midcal*, 445 U. S. at 106, 100 S. Ct. at 943. As the Court emphasized in *Goldfarb*, "[i]t is not enough that, as the . . . Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." 421 U. S. at 791, 95 S. Ct. at 2015. *Accord, Phonetele, Inc. v. American Telephone and Telegraph Co.*, 664 F. 2d 716, 736 (9th Cir. 1981).
>
> The fact that the Committee was established by Supreme Court Rule and composed of members selected from the Bar by the Arizona Supreme Court is not, as defendants assert, dispositive in itself of the state-action question. Although the defendants in the United States Supreme Court's state-action decisions were public bodies, or subdivisions of the state, that did not end the Court's analysis. The Court still looked to see whether the challenged restraints were clearly articulated and affirmatively expressed as state policy and were actively supervised by the state acting as sovereign. Thus, for instance, it was not dispositive that the restraints challenged in *Parker, Orrin W. Fox*, and *Midcal* were enforced, respectively, by a state commission, a state board, and a state de-

> partment. 317 U. S. at 344, 63 S. Ct. at 310; 439 U. S. at 103, 99 S. Ct. at 408; 445 U. S. at 100, 100 S. Ct. at 940. In *City of Lafayette*, 435 U. S. at 408, 98 S. Ct. at 1134, a plurality of the Court expressly rejected the argument that the state-action exemption extends to "all governmental entities, whether state agencies or subdivisions of a State . . . simply by reason of their status as such." This position has since been adopted by a majority of the Court. *See City of Boulder*, — U. S. at —, 102 S. Ct. at 842.

686 F. 2d at 696-97 (footnote omitted).

In the instant case, there is no "clear articulation and affirmative expression" by the state, as required in *Mid-Cal* for antitrust immunity, that indicates the legislature prefers that holders of property use the services of abstracters over title insurers. Nothing in South Dakota law prohibits or inhibits competition in the abstracting industry in South Dakota. There is also nothing in South Dakota's countersignature law which states that only abstracters maintaining an abstract plant within a county (as opposed to any qualified South Dakota abstracter) can countersign title insurance policies within the county, or that each abstract company must maintain a separate abtract plant for each county in which it wishes to countersign title policies and construct that plant at prohibitive expense. Moreover, even if it could be argued that such policies did exist and emanated from the state, there was no evidence presented below that the state actively supervises such policy. Yet the Eighth Circuit has taken the position that the SDABE regulations are immune from the federal antitrust laws because the state simply authorized the SDABE to act in the area of countersignatures, no matter how anticompetitive the effect of its regulations.

South Dakota statutes do provide that the SDABE *may* promulgate appropriate regulations. *See* SDCL § 36-13-6. However, nowhere does the state mandate or even encourage the development of county-wide fiefdoms for abstracter countersignatures on title insurance policies. What we have here is an unlawful horizontal division of territories created by the SDABE through its countersignature and abstract plant regulations. *See United States v. Topco Associates, Inc.*, 405 U. S. 596 (1972). The SDABE itself is composed principally of the competitors which benefit from this regulatory stifling of state-wide competition. Since the division by the state's abstracters and the SDABE with respect to countersignatures is a *per se* violation of the Sherman Act, no economic justification defense under the rule of reason is permissible. *See Northern Pacific Railway Co. v. United States*, 356 U. S. 1, 5 (1958).

The Petitioners are not asking for any sweeping repudiation of state statutory and regulatory provisions. Rather, Petitioners seek a determination that the Respondents cannot enforce certain regulations, namely ARSD §§ 20:36:04:01, 20:36:07:01, and 20:36:07:02, to the extent that such regulations taken as a whole prevent qualified and licensed abstracters in the State of South Dakota from countersigning title insurance policies in any county within the state after it conducts proper title work at the county register of deeds office. Such a narrow holding would permit First American Title Company of South Dakota to countersign title insurance policies for First American Title Insurance Company of South Dakota (if reactivated) or any other title insurance company, because it is already a qualified and licensed abstracter. Such a finding would

also permit all other qualified and licensed abstracters throughout the State of South Dakota, including many of the Respondents, to countersign policies throughout the state as well without constructing an abstract plant in each county. Thus, such a finding would not put the Petitioners in any preferred status. Such a holding would not permit unlicensed abstracters to countersign policies, and would not otherwise open up the title insurance or abstracting business to incompetent or inexperienced people. To the extent that the existing SDABE regulations prohibit Petitioners from conducting business statewide in the manner outlined above, they are pre-empted by the federal antitrust laws.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Dated November 1, 1983.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 82-1753

First American Title Company of South Dakota and First American Title Insurance Company of South Dakota,

Appellants,

vs.

South Dakota Land Title Association, South Dakota Abstracter's Board of Examiners, Black Hills Land and Abtract Company, Dennis O. Murray, Security Land and Abstract Company, Glen M. Rhodes, Fall River County Abstract Company, Charles E. Clay, Custer Title Company, Betty J. Gould, Haakon County Abstract Company, Keith Emerson, Wayne Roe, and Charles Nass,

Appellees.

Appeal from the United States District Court
for the District of South Dakota

Submitted: March 16, 1983
Filed: August 11, 1983

Before HEANEY and FAGG, Circuit Judges, and HANSON,* Senior District Judge

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HANSON, Senior District Judge.

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*The Honorable William C. Hanson, Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

This antitrust case concerns alleged anticompetitive private and regulatory restraints on the South Dakota abstracting and title insurance businesses. Plaintiffs/appellants, First American Title Company of South Dakota and First American Title Insurance Company of South Dakota, contend that they were the victims of a price-fixing conspiracy, frivolous and sham litigation, and a conspiracy to devise and enforce statutes and regulations which served to restrain trade in the abstracting and title insurance business, all in violation of sections 1 and 2 of the Sherman Act.[1] 15 U. S. C. §§ 1 and 2. Defendants/

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[1]The district court's memorandum opinion sets out plaintiffs' basic allegations as follows:

> Plaintiffs allege that the Defendants conspired to: (a) fix the price to Plaintiffs of abstractor countersignatures on title insurance policies; (b) engage in frivolous and sham litigation by appealing the decision of the South Dakota Director of Insurance to grant a certificate of authority to Plaintiff First American Title Insurance Company to do business in South Dakota; (c) engage in frivolous and sham litigation by participating in the case of *Fall River County Abstract Company v. Knutson*, (6th Judicial Cir. Circuit Court, Hughes County, S. D., Nov. 6, 1979, Judge Robert A. Miller, presiding); (d) engage in efforts to influence the enactment of S. L. 1979, ch. 345, amending SDCL 58-25-16, which had the effect of requiring all title insurance policies issued in the state to contain the countersignature of an abstractor; (e) enforce and attempt to enforce SDCL 58-25-16; (f) attempt to establish a fee schedule for countersignatures to be provided by abstractors on title insurance policies; (g) enforce and attempt to enforce ARSD § 20:36:04:01; (h) engage in a publicity campaign directed against the Plaintiffs, ostensibly directed toward influencing government action, which campaign was a sham to cover an attempt to interfere with the business relationships of Plaintiffs.
>
> *First American Title Co. v. South Dakota Land Title Association*, 541 F. Supp. 1147, 1150 (D. S. D. 1982) (Bogue, Ch. J.).

appellees are the South Dakota Land Title Association (the Association), a professional association of South Dakota abstracters; the South Dakota Abstracters' Board of Examiners (the Board of Examiners), the state board which regulates the business of abstracting; and various individual South Dakota abstracters and title companies. The district court also permitted the joinder of the State of South Dakota as a defendant pursuant to a motion by the Board of Examiners.

Following a bifurcated bench trial on the issue of liability, the district court entered judgment for defendants. The court found that there was insufficient evidence to support a conclusion that a private price-fixing conspiracy existed among defendant abstracters and their title companies. The court further concluded that plaintiffs' remaining antitrust claims were barred by the McCarran-Ferguson Act, the *Noerr-Pennington* doctrine, and the state action doctrine. The First American companies appeal these holdings and we affirm.

I.

A.

South Dakota pervasively regulates the business of abstracting and insuring land titles. *See* SDCL chs. 36-13 (Abstracters of Title) and 58-25 (Title Insurance Rates and Policies). Until July 1, 1979, South Dakota required that no foreign insurance company could issue a title insurance policy on property in South Dakota unless the policy was countersigned by a licensed abstracter who was

doing business in the county where the property was located. SDCL § 58-25-16.[2]

In order to do business in a particular county in South Dakota, an abstracter, among other requirements, must have an approved abstract plant showing "in a sufficiently comprehensive form, all instruments affecting the title to real estate which are of record or on file in the office of the register of deeds . . . ." SDCL § 36-13-10. The Board of Examiners, whose duty it is to "carry out the purposes and enforce the provisions of" the statutes governing abstracting and to "make such rules and regulations as may be necessary to carry out the purposes of those statutes," SDCL § 36-13-6, defines by regulation what constitutes "sufficiently comprehensive form" for an abstract plant's records. In part, this long-standing regulation requires that the plant contain

> a complete index showing every instrument recorded in the register of deeds' office in the county wherein [the abstracter] proposes to operate, properly listed against the specific property which it affects, and also a separate index showing all recorded instruments which do not affect specific property. This index . . . must be made from an actual check of each

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[2]Section 58-25-16 of the South Dakota Codified Laws provided:

> No foreign insurance company shall issue any policy of title insurance or certificate of title or other guarantee of title, covering any property located within the state of South Dakota, unless the same is countersigned by a person, partnership or corporation, who has met the requirements of §§ 36-13-8 and 36-13-10. Violation of this section is a Class 2 misdemeanor.

This statute was amended by the South Dakota legislature in 1979. *See* Part I B *infra*.

> page of each book of recorded instruments in said office, and in no case will a copy or film of the numerical index in the register's office be accepted.

ARSD § 20:36:04:01.

One of the First American companies' contentions is that the requirement that an abstracter's index be "made from an actual check of each page of each book of recorded instruments" imposes a financially-prohibitive burden upon anyone who wishes to open a competing abstract plant in a given county. *See* Part IV *infra*. The regulation's anticompetitive effect, according to appellants, is reflected by the current situation in South Dakota in which most counties have only one licensed abstracter, except for the more populated counties, which have two.

B.

Walter J. Linderman became a licensed abstracter in Pennington County, South Dakota in 1973 and formed First American Title Company of South Dakota in 1974. Linderman's title company served as a local agent for a foreign title insurance company, First American Title Insurance Company of California. In his dual capacity as abstracter and title insurance agent, Linderman was qualified to countersign title insurance policies on property located in Pennington County; but in insuring title on property outside Pennington County, Linderman was required to obtain the countersignature of that county's licensed abstracter and pay the resulting fee.

The anomoly in SDCL § 58-25-16 which required only foreign insurance companies to obtain countersignatures from abstracters on title insurance policies led Linderman to form a domestic title insurance company in December

1978—First American Title Insurance Company of South Dakota. This would have enabled Linderman to issue title insurance policies on property in any South Dakota county without obtaining a countersignature from that county's licensed abstracter.

This was not to be, however, because in the ensuing legislative session, the South Dakota legislature amended SDCL § 58-25-16 by deleting the word "foreign," thus extending the countersignature requirement to all title insurance policies, whether they be issued by a foreign or domestic insurance company.[3]

Defendants' opposition to Linderman's formation of a domestic title insurance company and their support for the amendments to § 58-25-16 form bases for two of the First American companies' antitrust claims. It is claimed that defendants engaged in frivolous and sham litigation in violation of the Sherman Act by appealing to state court the administrative decision by the Division of Insurance to grant a certificate of authority to First American Title Insurance Company of South Dakota. It is

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[3]The amended § 58-25-16 which became effective July 1, 1979, states:

> No insurance company shall issue any policy of title insurance or certificate of title or other guarantee of title, covering any property located within the state of South Dakota, unless the same is countersigned by a person, partnership or corporation, who has met the requirements of §§ 36-13-8 and 36-13-10 *in the county in which the real property is located, or maintains an abstract plant in the county where the real property is located and meets the requirements of chapter 36-13.* A violation of this section is a Class 2 misdemeanor.

The emphasized portion indicates language which was added by amendment in 1979.

further claimed that defendants engaged in unlawful anti-competitive conduct by lobbying in support of the amendments to § 58-25-16, which included the deletion of the word "foreign" from the statute.

Following the amendment to the countersignature statute, the alleged anticompetitive conspiracy continued in 1979 in the context of a controversy over whether the Division of Insurance or the Board of Examiners had the authority to set countersignature fees. The Board of Examiners already had at that time clear authority to "establish a schedule of fees for doing business" under chapter 36-13 relating to abstracters' services. SDCL § 36-13-25. The countersignature requirement, however, is in chapter 58-25, which regulates title insurance, a business overseen by the Division of Insurance and its director. SDCL § 58-2-21. The First American companies claim that defendants wanted the Board of Examiners to control countersignature fees to insure that they would be sufficiently high to stem the proliferation of title insurance in South Dakota. Presumably, the Board of Examiners' interest in setting high fees would be greater because three of its four members are required to be abstracters. SDCL § 36-13-1.

Following an opinion by the South Dakota Attorney General that the Division of Insurance had authority to set countersignature fees, the Association brough an ultimately unsuccessful state court action attacking the jurisdictional basis for this authority. *Fall River County Abstract Company v. Knutson,* (6th Judicial Circuit Court, Hughes County, S. D., November 6, 1979, Judge Robert A. Miller). A basis for the state court ruling was the conclusion that the countersigning of a title insurance

policy was purely a ministerial act because South Dakota law did not require any affirmative act by the abstracter before signing. During the 1979 South Dakota legislative session, defendants successfully lobbied the state legislature to pass laws which ensured that the countersigning of a title insurance policy was to be more than a ministerial act and which specifically gave the Board of Examiners the authority to set countersignature fees.[4] The litigation and lobbying by defendants on the countersignature fee issue are alleged to be further unlawful anticompetitive acts.

Although the Board of Examiners did in 1980 obtain authority to establish countersignature fees, no fee sched-

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[4]The legislature enacted SDCL § 36-13-26.1, which states, "An abstracter's countersignature on a title insurance policy is verification that the abstracter has furnished the insurer a report based on the examination of record title and any other title information and services required by the insurer and § 36-13-25."

The legislature also amended SDCL § 36-13-25 to state in pertinent part that, "[The Board of Examiners] shall also establish a schedule of fees and the requirements for an abstracter's services for countersigning title insurance policies pursuant to § 58-25-16."

The Board of Examiners subsequently promulgated regulations implementing these statutory changes. A title search—meaning a search of both the abstracter's plant and the official county records—is required before countersigning a title insurance policy. ARSD § 20:36:07:01. Additionally, the search is to be "made under the direction of an abstracter licensed in the county in which the property is located." ARSD § 20:36:07:02. This regulation also requires the abstracter's full cooperation with the title insurer by forbidding any unnecessary delays in performing the search and countersigning the policy: "Delays in the search or reporting shall be cause for complaint and disciplinary proceedings by the abstracters' board of examiners." *Id.*

ule ever regulated countersignature fees during the life of the First American Title Insurance Company of South Dakota. It is claimed that Linderman, as the agent for this company, was the victim of a private price-fixing conspiracy by the individually-named defendant abstracters and title companies in 1979 and 1980. Allegedly, these defendants conspired to fix countersignature fees at a level of 50% of the title insurance policy's premium. It is claimed that this private price-fixing conspiracy, coupled with the statutory changes, forced Linderman to dissolve First American Title Insurance Company of South Dakota in May 1980.

II.

First American's[5] initial claim on appeal—that the district court erred in finding insufficient evidence of a private conspiracy to fix prices for countersignature fees —need not long detain us. It is, of course, well-established that price-fixing is a *per se* violation of § 1 of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 218 (1940). In this case the district court concluded that evidence of a conspiracy to fix countersignature fees at 50% of the title insurance policy premium was "equivocal" and "not sufficient." First American failed to prove the presence of a conspiracy among the individual abstracters and title companies named as defendants, and further failed to prove that the countersignature fees charged by these defendants were fixed at a level of 50% of the policy premium. It would serve no purpose for this court to reiterate the district court's dis-

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[5]We shall refer to appellants collectively as "First American" throughout the remainder of this opinion.

cussion which reflects careful consideration of the evidence. *See First American Title Co. v. South Dakota Land Title Association*, 541 F. Supp. 1147, 1154-56 (D. S. D. 1982). We hold that substantial evidence in the record supports the district court's findings; nowhere are we left with the "definite and firm conviction that a mistake has been committed" with regard to these findings. *United States v. United States Gypsum Co.*, 333 U. S. 364, 395 (1948).

III.

First American next contends that the district court erred in holding that the *Noerr-Pennington* doctrine insulates defendants from antitrust liability for their lobbying and litigation activities. The *Noerr-Pennington* doctrine generally holds that the Sherman Act does not apply to joint efforts by groups seeking to exercise their first amendment right to petition the government, whether it be a petition to the legislature, an administrative agency, or the courts. *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508 (1972); *United Mine Workers v. Pennington*, 381 U. S. 657 (1965); *Eastern Railroad Conference v. Noerr Motor Freight*, 365 U. S. 127 (1961). Furthermore, such joint efforts "do not violate the antitrust laws even though intended to eliminate competition." *Pennington, supra*, 381 U. S. at 670. But an exception to the doctrine does hold that the Sherman Act applies if the joint action "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr Motor Freight, supra*, 365 U. S. at 144.

A.

First American initially attacks the district court's holding that lobbying by defendants in favor of the amendment to SDCL § 58-25-16 which resulted in deletion of the word "foreign" from the statute was activity which fell "squarely within the confines of the Noerr-Pennington Doctrine." *First American Title Co., supra,* 541 F. Supp. at 1157. We do not understand First American to argue the sham exception in attacking this holding. Indeed, such a claim would not prevail. As the district court concluded, "This is a classic case of a group of persons petitioning their government for relief and receiving the relief they request." *Id. Cf. Alexander v. National Farmers Organization,* 687 F. 2d 1173, 1195 (8th Cir. 1982), *cert. denied,* 51 U. S. L. W. 3826 (May 16, 1983) ("The sham exception generally involves governmental contacts which are not a genuine attempt to influence official decision making, but instead are merely an attempt to interfere directly with the business relationships of a competitor.").

Rather First American claims that the *Noerr-Pennington* doctrine does not apply because a state agency—the Board of Examiners — was an alleged conspirator along with the private party defendants in seeking amendment to the countersignature statute. First American relies on *Duke & Co. v. Foerster,* 521 F. 2d 1277, 1281-82 (3d Cir. 1975), in arguing for application of this coconspirator exception to the *Noerr-Pennington* doctrine. In *Duke & Co.,* plaintiff alleged that municipal corporations which owed the Pittsburgh Civic Arena, Three Rivers Stadium, and the Pittsburgh International Airport conspired with private corporations which operated these

facilities to boycott malt beverages manufactured by plaintiff. The court of appeals reversed the district court's dismissal of the complaint, holding in part that the *Noerr-Pennington* doctrine did not shield defendants from antitrust liability.

> Both *Noerr* and *Pennington* involved suits against *private parties* who had allegedly conspired to influence governmental action. In neither case was it alleged that the governmental entity had collaborated to promote the conspiracy. Where the complaint goes beyond mere allegations of official persuasion by anticompetitive lobbying and claims official participation with private individuals in a scheme to restrain trade, the *Noerr-Pennington* doctrine is inapplicable.

Duke & Co., supra, 521 F. 2d at 1282 (emphasis in original).

We do not quarrel with the court's conclusion in *Duke & Co.* that the *Noerr-Pennington* doctrine did not apply. In our view, however, *Noerr-Pennington* was inapplicable because of the nature of the conduct alleged in the complaint, not because of the nature of the parties involved.[6] The anticompetitive conduct alleged in the complaint in *Duke & Co.* was a boycott of plaintiff's product; clearly an alleged anticompetitive boycott is not first amendment conduct which the *Noerr-Pennington* doctrine

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[6]This circuit recently refused to rely on the *Duke & Co.* coconspirator exception, noting that it has been subject to criticism. *Westborough Mall, Inc. v. City of Cape Girardeau,* 693 F. 2d 733, 746 (8th Cir. 1982), *cert. denied,* 51 U.S.L.W. 3841 (May 23, 1983); *see Metro Cable Co. v. CATV of Rockford, Inc.,* 516 F. 2d 220, 229-30 (7th Cir. 1975); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine,* 45 U.Chi.L.Rev. 80, 115 (1977) ("in most cases the co-conspirator exception is unworkable and should not be recognized").

was formulated to protect. The Court made this distinction in *Noerr Motor Freight*.

> We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. . . . [S]uch associations . . . bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.

Id., 365 U. S. at 136. Thus the Court made clear that "[t]he proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena." *Id.*, 365 U. S. at 141. *Duke & Co.* and the instant case are embodiments of the Court's distinction. Whereas *Duke & Co.* involved allegations of anticompetitive government activity in the business world, the instant case concerns government activity in the political arena. We therefore hold that *Duke & Co.* is distinguishable on its facts.

First American further contends that defendants' lobbying campaign should not be protected by *Noerr-Pennington* because it involved 'a misuse of the lobbying process" through false statements and inaccuracies that were made by defendants to the state legislature. The focus of this complaint appears to be a letter that the Board of Examiners sent to members of the South Dakota

legislature explaining the Board's understanding of the then-current requirements for becoming a licensed abstracter and stating the Board's fear that failure to amend the countersignature statute could conceivably result in a domestic title insurance company issuing policies without performing a title search. The district court made no specific findings in this regard, but to characterize these statements as "misrepresentations" and to withhold *Noerr-Pennington* protection on account of this would result in undermining the doctrine itself. This letter, which contained at most mild political hyperbole, was well within the bounds of traditional political activity which *Noerr-Pennington* was established to protect. *Cf. Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F. 2d 733, 746 (8th Cir. 1982), *cert. denied*, 51 U. S. L. W. 3841 (May 23, 1983) (holding that illegal or fraudulent actions employed in conjunction with legitimate lobbying went beyond traditional political activity protected by *Noerr-Pennington*).

Even assuming that misrepresentations may have appeared in the Board's letter, this would not preclude application of the *Noerr-Pennington* doctrine—at least in the context of legislative lobbying. The Supreme Court in *California Motor Transport* made the following comments regarding the bounds of constitutionally-protected conduct in the political arena:

> The political campaign operated by the railroads in Noerr to obtain legislation crippling truckers employed deception and misrepresentation and unethical tactics. We said:
>
> "Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a

> caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical." 365 U. S., at 141.

Id. 404 U. S. at 512.

Finally, we note that First American had equal access to the legislature to lobby against the amendment and to correct any "misrepresentations" which may have been made by defendants. Accordingly, we hold that the district court properly applied the *Noerr-Pennington* doctrine to defendants' activities in lobbying the South Dakota legislature to amend the countersignature statute.

B.

First American also attacks the district court's application of the *Noerr-Pennington* doctrine to the state court litigation which arose during the period when Linderman formed and operated his domestic title insurance company. First American claims that certain defendants in two instances engaged in baseless and sham litigation intended to harass and interfere with First American's business relations. The Association opposed the granting of a certificate of authority by the Division of Insurance to First American Title Insurance Company of South Dakota and appealed the subsequent grant of the certificate to state court. This appeal resulted in affirmance of the Division of Insurance's decision to grant the certificate. Also, in *Fall River County Abstract Co. v. Knutson, supra,* the Association and the Fall River County Abstract Com-

pany sought a writ of prohibition in state court to prohibit the director of the Division of Insurance from establishing a fee schedule for the countersigning of title insurance policies. First American Title Insurance Company of South Dakota intervened in this litigation as a defendant. The district court held that the *Noerr-Pennington* doctrine protected the Association and the Fall River County Abstract Company from antitrust liability for their participation in these actions.

It is established that "[t]he right of access to the courts is indeed but one aspect of the right of petition"; accordingly, groups do not violate the Sherman Act by "us[ing] the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." *California Motor Transport, supra,* 404 U. S. at 510-11. The sham exception to this doctrine holds that litigation of baseless claims which "may be characterized as a sham cover for what is really just an attempt to directly interfere with the business relations of a competitor," is subject to scrutiny under the Sherman Act. *Alexander v. National Farmers Organization, supra,* 687 F. 2d at 1200; see *California Motor Transport, supra,* 404 U. S. at 513.

In *Alexander v. National Farmers Organization, supra,* the parties initiated reciprocal antitrust actions arising out of competition in the milk industry between the NFO and certain large midwest dairy cooperatives. The court held that certain lawsuits initiated by the other dairy cooperatives against NFO were not actionable under the antitrust laws by application of the *Noerr-Pennington* doctrine, even though "the litigation directly

against NFO was intended in part to hamper NFO's ability to compete." *Id.*, 687 F. 2d at 1200. The court concluded that "[t]here were genuine disputes regarding NFO's solicitation methods," *id.*; thus the sham exception did not apply.

Similarly in this case we do not doubt that the litigation was intended in part to hamper First American's ability to carry on the title insurance business with a domestically-formed company. But both causes of action also involved genuine disputes. The controversy over who was the proper party to establish a countersignature fee schedule was certainly genuine. When the Association lost in the judicial forum, it continued to assert its position before the South Dakota legislature and ultimately achieved the result it sought—the Board of Examiners was vested with authority to establish the fee schedule.

Likewise, the Association's effort to prevent Linderman's domestic title insurance company from receiving a certificate of authority to operate in South Dakota was not a baseless claim or sham cover for an attempt to interfere with First American's business.[7] The Association had a genuine interest in preventing a domestic title insurance company from operating in South Dakota—at least while South Dakota law had the effect of permitting a domestic insurance company to issue title insurance policies without securing a title search from an abstracter who was licensed in the county where the property to be

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[7]SDCL § 58-6-8 requires the director of the Division of Insurance to hold a hearing in order to determine whether authority to engage in the insurance business should be granted. Part of this inquiry is a determination whether the grant of such authority would be in the public interest. *Id.*

insured was located.[8] Clearly the Association had a first amendment right of access both to the administrative and the judicial forums to press its opposition. We discern no abuse of these processes which was intended to produce an illegal result. *Cf. California Motor Transport, supra* (in which the Court held that the sham litigation exception applied to allegations that defendants abused administrative and judicial processes to produce the illegal results of barring plaintiffs from access to the agencies and courts). We thus affirm the district court's application of the *Noerr-Pennington* doctrine to these litigation episodes.

IV.

First American also challenges the district court's application of the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). First American's rather unclear claims in its complaint state that defendants violated the Sherman Act by "enforc[ing] and attempt[ing] to enforce" the countersignature statute (SDCL § 58-25-16) and the regulation setting out the requirements for an

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[8]Apparently, the Association's asserted public interest concern (see note 7, *supra*) was that untrained individuals could issue title insurance policies without the necessity of being supervised or trained by abstracters licensed by the State of South Dakota. Brief of the Association at 6-7. This situation prevailed as long as SDCL § 58-25-16 required only foreign insurance companies to obtain the countersignature of a licensed abstracter before issuing a policy of title insurance. The Association asserted its position without success before the Division of Insurance and before a state court. It appealed the state court's decision to the South Dakota Supreme Court, but abandoned this appeal following the amendment of SDCL § 58-25-16 which deleted the word "foreign" from the statute, thus extending the statute's requirement to domestic title insurance companies.

abstract plant (ARSD § 20:36:04:01), as well as that defendants violated the Sherman Act by attempting to establish a fee schedule for countersignatures pursuant to SDCL § 36-13-25. The district court held that these particular claims were barred from federal antitrust scrutiny on account of the state action doctrine under which federal law impliedly defers to "state action" when the state program at issue satisfies certain requirements. P. Areeda & D. Turner, *Antitrust Law* ¶ 207 at 58 (1978).

It appears, however, that First American shifted its focus somewhat during the course of the district court proceedings by dropping its challenge to defendants' authority to establish a countersignature fee schedule and arguing that the Sherman Act preempts the countersignature statute and certain regulations. *See* Clerk's Record (C. R.) at 74-75. The district court did not address this particular argument. The challenged regulations are those setting out the abstract plant requirements (ARSD § 20:36:04:01), requiring the abstracter to search both the official records and the abstracter's title plant before countersigning a title insurance policy (ARSD § 20:36:07:01), and requiring that the search on behalf of a title insurer be made under the direction of the licensed abstracter (ARSD § 20:36:07:02).

First American claimed before the district court that the challenged statute and regulations produce the following anticompetitive effect. The challenged provisions impose a rigorous abstract plant requirement which must be satisfied in each county in which an abstracter seeks to be licensed to do business. ARSD § 20:36:04:01. Coupled with this is the countersignature requirement, which states that a title insurance policy must be countersigned by an

abstracter who is licensed in the county where the property to be insured is located. SDCL § 58-25-16. Because First American has satisfied the state's abstract plant requirements only in Pennington County, the anticompetitive effect is to prevent First American from performing title searches on a statewide basis, which in turn prevents First American from countersigning title insurance policies on a statewide basis.

First American reiterates this argument on appeal and adds that a further anticompetitive result of the regulatory scheme is to create a horizontal division of territories under which each abstracter is assured of a monopoly of the abstracting business in the county where the abstracter is licensed to operate. *See United States v. Topco Associates, Inc.*, 405 U. S. 596, 608 (1972) ("One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.") We take this latter argument to be directed mainly at the abstract plant requirement which states that the plant must contain an index and that the index "must be made from an actual check of each page of each book of recorded instruments in [the register of deeds'] office, and in no case will a copy or film of the numerical index in the register's office be accepted." ARSD § 20:36:04:01.[9] According to First American, these

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[9]See Brief of First American at 41 (where First American claims that the abstract plant requirement makes it "prohibitively expensive" to construct an abstract plant and that the effect of the regulation is to give "existing abstracters monopoly power over title services within their respective counties"). Apparently there was never any evidence offered at trial indicating exactly how costly it would be to assemble an abstract plant in accordance with ARSD § 20:36:04:01.

anticompetitive effects require preemption of the challenged statute and regulations under the Sherman Act.

In arguing for preemption, First American claims neither to seek "any sweeping repudiation of state statutory and regulatory provisions," nor to "seek a finding of unconstitutionality of any state statutes." Brief of First American at 43. On the contrary, the result of a successful preemption attack upon a state statute is that the statute is stricken down as unconstitutional under the Supremacy Clause. *See, e.g., Seagram & Sons v. Hostetter*, 384 U. S. 35, 45 (1966). Accordingly, it is clear that First American is making a facial challenge to the above-indicated statute and regulations which are said to conflict with the Sherman Act. We also clarify that although First American's preemption argument appears to be directed against all defendants without differentiation, the only defendants against whom the argument necessarily can be directed are the State of South Dakota and the Board of Examiners. The state (in the form of its legislature) and the Board promulgated and enforce[10] the challenged statute and regulations; consequently, it is they who would be enjoined from enforcing the challenged aspects of the regulatory scheme if First American were to prevail. We trouble to clarify these points because they are important to our ensuing discussion of the preemption/state action issues.

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[10]The unauthorized conduct of the business of abstracting in South Dakota is a petty offense. SDCL § 36-13-9. The Board of Examiners is empowered to commence actions for injunctions against such unauthorized business as an alternative to the state's initiation of criminal proceedings. SDCL § 36-13-9.1. In addition, SDCL § 58-25-16 states that violation of its countersignature requirement "is a Class 2 misdemeanor."

A.

A due regard for federalism led the Supreme Court to create what is referred to as the state action doctrine in *Parker v. Brown, supra.* A raisin producer attempted to use the Sherman Act in *Parker* to strike down a marketing program enacted by the California legislature to create price supports for raisins. The Court assumed that the program would have violated the Sherman Act if it had been devised and carried out by private individuals or corporations. But because the marketing program "derived its authority . . . from the legislative command of the state," *id.*, 317 U. S. at 350, the program was not prohibited by the Sherman Act. The Court found no intent in the Sherman Act to occupy a field so broad that it precluded the states, acting in their sovereign capacities, from exercising their broad police powers to effect economic regulations.[11] "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* 317 U. S. at 351.

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[11]Of course the state's exercise of its police powers in effecting economic regulations may impermissibly impinge on other federal interests which do not concern us in the instant case—notably the interest in preventing significant burdens on interstate commerce which is protected by the Commerce Clause. *See* P. Areeda & D. Turner, *Antitrust Law* ¶¶ 219-20 (1978).

Of late, the state action doctrine has become a road well-traveled by the Court.[12] Its signposts, however, remain less than clear. We know, for example, that when a state legislature enacts an otherwise unlawful anticompetitive system of regulation, such regulation is "outside the reach of the antitrust laws under the 'state action' exemption" provided that the regulations reflect a state policy "clearly articulated and affirmatively expressed, designed to displace unfettered business freedom" with regulation. *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978). This state policy must be articulated by the state acting in its sovereign capacity; this much is clear from *Parker* itself. Naturally the question arises—what constitutes an articulation of the state in its sovereign capacity? Certainly enactments of a state legislature qualify as the state acting in its sovereign capacity. *Orrin W. Fox, supra; Parker, supra.* Also, the state supreme court acting in its supervisory capacity over the practice of law qualifies as the state acting in its sovereign capacity. *Bates v. State Bar of Arizona*, 433 U. S. 350, 359-60 (1977); *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 789-90 (1975).

On the other hand, "state agencies or subdivisions of a State . . . simply by reason of their status as such," apparently do not qualify as the state acting in its sover-

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[12] *See Community Communications Co. v. City of Boulder*, 455 U. S. 40 (1982); *California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc.*, 445 U. S. 97 (1980); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U. S. 96 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389 (1978); *Bates v. State Bar of Arizona*, 433 U. S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U. S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975).

eign capacity. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 408 (1978). Actions by such bodies, however, may reflect a state policy to displace competition with regulation. Such actions will not be subject to scrutiny under the Sherman Act provided that "an adequate state mandate for anticompetitive activities exists." *Id.*, 435 U. S. at 415. This mandate exists "when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' " *Id.*

Finally, we observe that conduct by a private party may be cloaked with state action immunity provided that the conduct was pursuant to a "clearly articulated and affirmatively expressed" state policy and that the conduct was "actively supervised"[13] by the state itself. *Cal-*

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[13]Uncertainty exists regarding whether the second *Midcal* criterion—the requirement of active state supervision—applies to conduct by municipalities and other state subdivisions as well as to conduct by private parties. The Court expressly declined to address this issue in *Community Communications Co. v. City of Boulder*, 455 U. S. 40, 51 n. 14 (1982) ("Because we conclude in the present case that Boulder's moratorium ordinance does not satisfy the 'clear articulation and affirmative expression' criterion, we do not reach the question whether that ordinance must or could satisfy the 'active state supervision' test focused upon in *Midcal*.")

This circuit has answered this question in the negative in the context of municipal conduct. *Gold Cross Ambulance & Trans. v. City of Kansas City*, 705 F. 2d 1005, 1014 (8th Cir. 1983) ("[T]he state supervision requirement is intended to control the potential for abuse created by authorizing private persons to make anticompetitive decisions and to insure that those decisions are consistent with the clearly articulated and affirmatively expressed state policy at stake.") The court's reasoning in *Gold Cross* was fourfold: municipal officials are

(Continued on next page)

ifornia Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U. S. 97, 105 (1980).

B.

We therefore see the state action doctrine to be a construct developed by the Court and based upon principles of federalism which permits the coexistence of the Sherman Act and apparently conflicting state economic regulation. Absent the state action doctrine, the Sherman Act preempts the conflicting state regulation. *Rice v. Norman Williams Co.*, — U. S. —, 73 L. Ed. 1042, 1049 (1982) (The Sherman Act will preempt a state statute if "there exists an irreconcilable conflict between the federal and state regulatory schemes.". It is then self-evident that application of state action principles follows the antitrust court's initial determination that there is truly a conflict between the Sherman Act and the challenged regulatory scheme. *See, e. g., Midcal, supra,* 445 U. S. at 102 ("The threshold question is whether California's plan for wine pricing violates the Sherman Act."); *Parker, supra,* 317 U. S. at 350 ("We may assume

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(Continued from previous page)

generally politically accountable to their citizens, which keeps those officials in check; requiring state authorization for local government conduct is analogous to requiring active supervision of private conduct; it would make little sense to require the state to supervise and enforce municipal ordinances; and state supervision could lead to duplicative, wasteful regulation as well as the erosion of local autonomy. *Id.*, 705 F. 2d at 1014-15. *But see Ronwin v. State Bar of Arizona*, 686 F. 2d 692, 696 (9th Cir. 1981), *cert. granted*, 51 U.S.L.W. 3825 (May 16, 1983) (No. 82-1474) (The court held in the context of challenged action by the state supreme court-appointed committee which grades the Arizona bar examination that the acts of this governmental body had to be "actively supervised by the state itself" in order to be immune from Sherman Act scrutiny.).

for present purposes that the California prorate program would violate the Sherman Act . . . . ").

In *Rice, supra,* the Court set out how the antitrust court is to analyze whether a state regulatory scheme conflicts with the Sherman Act when aspects of the state scheme are challenged in the abstract.

> [A] state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Id., 73 L. Ed. 2d at 1051. The challenged statute in *Rice* empowered liquor distillers to designate which California wholesalers may import the distiller's product into the state. The Court characterized the conduct allowed by the statute as a vertical nonprice restraint; such restraints have been held not to be *per se* violations of the Sherman Act. *Continental T. V., Inc. v. GTE Sylvania Inc.,* 433 U. S. 36, 57-59 (1977). Accordingly, the Court held that there was no irreconcilable conflict between the state statute and the Sherman Act; hence, there was no pre-

emption by the Act.[14] The Court noted that "Because of our resolution of the preemption issue, it is not necessary for us to consider whether the statute may be saved from invalidation under the doctrine of *Parker v. Brown* . . . ." *Rice, supra,* 73 L. Ed. 2d at 1052 n. 9.

C.

Applying the above principles to the instant case, we arrive at the following conclusions. Initially, the district court, in analyzing First American's Sherman Act challenges to aspects of South Dakota's regulation of the business of abstracting, applied the two *Midcal* criteria and concluded that the state action doctrine immunized the regulatory scheme from Sherman Act scrutiny. As we have stated, however, the *Midcal* criteria apply only in the context of whether a private party's conduct is immunized from Sherman Act scrutiny by the state action doctrine. *See Gold Cross Ambulance & Trans. v. City of Kansas City,* 705 F. 2d 1005, 1014 (8th Cir. 1983).

More fundamentally, we do not perceive that the aspects of South Dakota's regulatory scheme which are challenged by First American "irreconcilably conflict" with the Sherman Act under the principles of *Rice, supra.* We are told by First American that an irreconcilable conflict does exist because the rigorous abstract plant requirement of ARSD § 20:36:04:01 effectively forecloses com-

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[14]The Court indicated that the conduct of a particular distiller under the statute would not necessarily be insulated from scrutiny under the Sherman Act, even though there was no basis "for condemning the statute itself by force of the Sherman Act." *Rice v. Norman Williams Co.,* — U. S. —; 73 L. Ed. 2d 1042, 1052 (1983).

petition in the abstracting business within a county and creates a horizontal division of territories, which is a *per se* violation of § 1 of the Sherman Act. *See* note 9 *supra* and accompanying text. But *Rice* states that for an irreconcilable conflict to arise, the challenged regulatory provision must contemplate conduct that "is in all cases a per se violation." *Id.*, 73 L. Ed.2d at 1051. Regardless of whether the challenged regulation tends to have the anti-competitive effect claimed by First American, it cannot be said that the regulation mandates or authorizes conduct that in all cases constitutes a § 1 violation. First American and its principal, Linderman, exemplify this. In 1973, Linderman became a licensed abstracter in Pennington County which indicates that Linderman was able to fulfill the abstract plant requirement and thus compete on an equal footing with the other licensed abstracter in Pennington County at that time, Theresa Burke. Accordingly, we hold that because no irreconcilable conflict exists between the Sherman Act and the abstract plant requirement, the Sherman Act does not preempt the requirement.

Furthermore, even if we assumed that the challenged aspects of the regulatory scheme conflicted with the Sherman Act sufficiently to require preemption, we would hold that the scheme reflects a clearly articulated and affirmatively expressed state policy to replace unfettered business freedom with regulation. *See Orrin W. Fox, supra,* 439 U. S. at 109. Thus the state action doctrine would apply to preclude preemption. The state as sovereign enacted the challenged countersignature statute, SDCL § 58-25-16, and although it is within the code chapter regulating the business of title insurance, it undoubtedly

regulates the business of abstracting as well. In fact, First American's complaint about the statute relates to its anticompetitive effect on the business of abstracting.

The statutory requirement that a title insurance policy be signed by a licensed abstracter who, by regulation, has searched both his own title plant and the official county records (ARSD § 20:36:07:01) before countersigning ensures that someone whom the State of South Dakota deems qualified has performed a professional title search before title to property is transferred. Indeed, First American at oral argument appeared to have no quarrel with this policy, stating that it did not really object to the countersignature requirement, but only objected to the regulations which precluded Linderman, a licensed abstracter, from searching official county records outside of Pennington County and countersigning title insurance policies based on his search of those records. According to First American, the state's requirement that an abstracter have an abstract plant in each county in which the abstracter wishes to do business serves only anticompetitive ends. The State of South Dakota at trial justified its abstract plant requirement by introducing evidence which indicated the poor—in some cases illegible—condition of many counties' official records. Thus the state requires an actual check, in lieu of copies, of each page of the official county records in constructing an index for the abstract plant.

We do not fulfill our role as the antitrust court by determining whether the manner in which the State of South Dakota regulates the business of abstracting is wise or appropriate. This type of judicial inquiry by the federal courts has long been repudiated in the context

of due process. *See Ferguson v. Skrupa*, 372 U. S. 726, 731 (1963) (The Due Process Clause does not empower the judiciary "to sit as a 'superlegislature to weigh the wisdom of legislation' . . . ."). Rather we fulfill our role by determining whether the state as a sovereign, in the broad exercise of its police powers, has chosen "to displace competition with regulation . . . ." *City of Lafayette, supra*, 435 U. S. at 413.

Certainly regulation of the business of title insurance falls within the state's broad police powers. As the South Dakota Supreme Court observed in response to a due process challenge to the fee schedule for abstracters' services, which at the time was established by state statute:

> Because the abstracters' product is an indispensable part of real property transfers and due to the reliance which must necessarily be placed upon it by the vendor and vendee alike, the legislature has properly exercised its police power by the enactment of Ch. 36-13 [Abstracters of Title]. It is evident that there does exist a real and substantial relation between the regulatory means adopted in regard to price regulation and the actual or manifest evil possible due to the monopolistic nature of the business.

Siefkes v. Clark Title Co., 215 N. W. 2d 648, 652 (S. D. 1974).[15] The pervasiveness of South Dakota's regulation

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[15] *See also* 1 Am. Jur. 2d *Abstracts of Title* § 4 at 230 (1962) ("The inherent police power of the states permits reasonable regulation of businesses or professions when such regulation appears necessary for the general welfare of the people, and in the exercise of this power, a state may impose reasonable regulations upon those who seek to engage in the business of abstracting titles to real estate.")

—to the point of mandating the fixing of prices for abstracters' services, SDCL § 36-13-25—indicates that the state has indeed chosen to displace competition with regulation in the business of abstracting.

First American argues that even if the statutes which regulate the abstracting business are protected by the state action doctrine, the regulations promulgated by the Board of Examiners are not because they do not qualify as enactments of the state as sovereign. We hold that the abstract plant regulation (ARSD § 20:36:04:01), the regulation requiring the abstracter to search both his own abstract plant and the official county records before countersigning (ARSD § 20:36:07:01), and the regulation requiring the search pursuant to the countersignature requirement to be under the supervision of a licensed abstracter (ARSD § 20:36:07:02) all to be actions clearly within the contemplation of the legislature in granting authority to the Board to regulate. *See City of Lafayette, supra*, 435 U. S. at 415.

South Dakota by statute requires that an abstracter maintain an abstract plant "showing in a sufficiently comprehensive form, all instruments affecting the title to real estate which are of record or on file in the office of the register of deeds . . . ." SDCL § 36-13-10. The Board of Examiners in turn sets out by regulation precisely what constitutes "sufficiently comprehensive form" for an abstract plant in ARSD § 20:36:04:01. South Dakota also requires by statute that an abstracter maintain a set of records for "each county wherein said person seeks to engage in compiling abstracts of land titles . . . ." SDCL § 36-13-10. In addition, SDCL § 36-13-26.1 requires the abstracter to examine record title and fur-

nish a report to the title insurer before countersigning the title insurance policy. The Board of Examiners in turn sets out that the "examination of record title" required by SDCL § 36-13-26.1 must include an examination of both the abstracter's abstract plant and the official county records. ARSD § 20:36:07:01. The Board also requires that the search pursuant to the countersignature requirement be made "under the direction of an abstracter licensed in the county in which the property is located," ARSD § 20:36:07:02, to ensure that the search is not improperly delegated to one who has not met the requirements for becoming a licensed abstracter. Clearly the statutory provisions which govern the business of abstracting indicate that the challenged regulations of the Board of Examiners are the kind of action contemplated by the South Dakota legislature. *Cf.* Areeda, *Antitrust Immunity for "State Action" After Lafayette,* 95 Harv. L. Rev. 435, 445 n. 49 (1981) ("Immunity [under the state action doctrine] for decisions of subordinate agencies or officials cannot depend on an explicit command from the legislature; delegation of governmental powers necessarily includes the discretion to make decisions not compelled by the legislature."). To the extent that the challenged regulatory provisions impose an anticompetitive restraint upon First American, such restraint "is a necessary or reasonable consequence of engaging in the authorized activity." *Gold Cross, supra,* 705 F. 2d at 1013.

First American relies on cases from the Ninth and Fifth Circuits in arguing that the challenged regulations were not compelled by the South Dakota legislature, thus they are not entitled to state action immunity. *Ronwin v. State Bar of Arizona,* 686 F. 2d 692 (9th Cir. 1981),

cert. granted, 51 U. S. L. W. 3825 (May 16, 1983) (No. 82-1474); *United States v. Texas State Board of Accountancy*, 464 F. Supp. 400 (W. D. Tex. 1978), *modified*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979). Our above discussion should indicate, however, that we are in fundamental disagreement with our brethren in these circuits regarding application of the state action doctrine to state agencies or subdivisions. In both these cases, the courts cast the inquiry in mandatory terms—whether the challenged action by the state agency was compelled by the state legislature. In both cases there were vigorous dissents putting forth the view adhered to by this circuit: "that an adequate state mandate for anti-competitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" *City of Lafayette*, 435 U. S. at 415.

Accordingly, we conclude that the Sherman Act does not irreconcilably conflict with the challenged statute and regulations, and that, even if it did, the state action doctrine would operate to shield the regulatory provisions from anti-trust scrutiny.[16]

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[16]It is thus unnecessary to consider the district court's alternative holding that the countersignature statute is exempt from antitrust scrutiny under the McCarran-Ferguson Act, 15 U. S. C. §§ 1011-15, because the statute constitutes state regulation of the "business of insurance." *See Union Labor Life Ins. Co. v. Pireno*, — U. S. —, 102 S. Ct. 3002 (1982).

Additionally, we reject First American's contention that the district court failed to consider its claims under § 2 of the Sherman Act. 15 U. S. C. § 2. If the alleged private price-fixing

(Continued on next page)

V.

In conclusion we observe that the regulations challenged here by First American undoubtedly restrained it from carrying on its business in the manner it desired. That the regulations, in this sense, have an anticompetitive effect does not invalidate them under the Sherman Act, "[f]or if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Exxon Corp. v. Governor of Maryland*, 437 U. S. 117, 133 (1978).

For the foreging reasons, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

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conspiracy was supposed to be evidence of monopolization, the claim failed for lack of proof. If the lobbying and litigation activity which has been held immune from anti-trust scrutiny under *Noerr-Pennington* is alleged to be evidence of an attempt or a conspiracy to monopolize, then *Noerr-Pennington* applies to immunize defendants from these claims as well.

APPENDIX B

UNITED STATES DISTRICT COURT
District of South Dakota
June 8, 1982

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Chief Judge

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Re: First American Title Company of South Dakota and First American Title Insurance Company of South Dakota vs. South Dakota Land Title Association, South Dakota Abstracters Board of Examiners, Black Hills Land and Abstract Company, Dennis O. Murray, Security Land and Abstract Company, Glen M.

Rhodes, Fall River County Abstract Company, Charles E. Clay, Custer Title Company, Betty J. Gould, Haakon County Abstract Company, Keith Emerson, Wayne Roe and Charles Nass, CIV80-5076

MEMORANDUM OPINION

Gentlemen:

This matter is an antitrust suit brought under sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and tried before this Court on June 15, 16, 17 and 19 of 1981. Plaintiffs are First American Title Company of South Dakota, which is a South Dakota company presently doing business within South Dakota, and First American Title Insurance Company of South Dakota, which operated in South Dakota until May, 1980, when the company was voluntarily dissolved. The Defendants include the South Dakota Land Title Association (SDLTA), which is an unincorporated association of land title abstractors in South Dakota, and the South Dakota Abstracters' Board of Examiners (SDABE), which is a South Dakota state agency under the South Dakota Department of Commerce. *See* SDCL ch. 36-13. SDABE regulates real estate title abstractors in the state of South Dakota. The remaining Defendants are Western South Dakota abstract companies and individual licensed abstractors, all of whom are members of Defendant SDLTA and some of whom are members of Defendant SDABE. The State of South Dakota has also been joined as a defendant pursuant to a motion of SDABE.

Plaintiffs allege the Defendants have engaged in a conspiracy in restraint of trade and have also monopolized, attempted to monopolize, and engaged in a conspiracy to monopolize, all in violation of §§ 1 and 2 of the Sherman

Act. The basic allegations in Plaintiffs' complaint are found in ¶¶21(a) through (h). Plaintiffs allege that the Defendants conspired to: (a) fix the price to Plaintiffs of abstractor countersignatures on title insurance policies; (b) engage in frivolous and sham litigation by appealing the decision of the South Dakota Director of Insurance to grant a certificate of authority to Plaintiff First American Title Insurance Company to do business in South Dakota; (c) engage in frivolous and sham litigation by participating in the case of *Fall River County Abstract Company v. Knutson,* (6th Judicial Circuit Court, Hughes County, C. D., Nov. 6, 1979, Judge Robert A. Miller, presiding); (d) engage in efforts to influence the enactment of S. L. 1979, ch. 345, amending SDCL 58-25-16, which had the effect of requiring all title insurance policies issued in the state to contain the countersignature of an abstractor; (e) enforce and attempt to enforce SDCL 58-25-16; (f) attempt to establish a fee schedule for countersignatures to be provided by abstractors on title insurance policies; (g) enforce and attempt to enforce ARSD § 20:36:04:01; (h) engage in a publicity campaign directed against the Plaintiffs, ostensibly directed toward influencing government action, which campaign was a sham to cover an attempt to interfere with the business relationships of the Plaintiffs.

The licensing of abstractors in South Dakota is governed by SDCL 36-13. That chapter created Defendant SDABE to act as the state agency to regulate the abstracting business in South Dakota.

Most South Dakota counties have only one abstract firm. Plaintiffs have attempted to show that this condition was created by SDABE regulations which, Plaintiffs

have alleged, make it financially prohibitive to open a competing abstract plant in any county. Plaintiffs have further alleged that it is the goal of Defendants SDABE and SDLTA to maintain the status quo so as to shield SDLTA members from competition within their individual counties.

Plaintiff First American Title Company was organized by Walter J. Linderman and began operating in Pennington County, South Dakota in 1974. It acted as the local agent for a foreign title insurance company. Under South Dakota law in effect at that time, a countersignature by a licensed abstractor or abstract company was required on all title insurance policies issued by foreign title insurance companies. Linderman, through First American Title Company, could countersign policies on property in Pennington County. However, in other counties countersignatures had to be obtained from other abstractors for a price which in Plaintiffs' opinion was too high.

Because a countersignature was not required on domestic title insurance policies, Linderman decided to organize a domestic title insurance company. By doing this he could issue title insurance policies throughout the state without the necessity of an abstractor's countersignature. Linderman incorporated Plaintiff First American Title Insurance Company in December, 1978, for this purpose.

Plaintiffs claim that the Defendants were opposed to Linderman's establishing a domestic title insurance company and united in an attempt to thwart his efforts. The first step allegedly taken by Defendants was intense lobbying which resulted in South Dakota law being changed so as to make it necessary for all title insurance policies,

both foreign and domestic, to be countersigned by an abstractor. This again made it necessary for Linderman's First American Title Insurance Company to obtain countersignatures from other abstractors on policies dealing with property outside Pennington County.

The second step allegedly taken by Defendants to damage Plaintiffs' business was SDLTA's opposition to First American Title Insurance Company's application for a certificate of authority to do business in the state. Plaintiffs charge that SDLTA had no justification for attacking First American Title Insurance Company's application and did so just to harass Plaintiffs. The application was granted by the South Dakota Director of the Division of Insurance. This decision, however, was then appealed to state court and was affirmed. Plaintiffs allege that the sole purpose of this appeal was to harass and competitively injure First American Title Insurance Company.

Plaintiffs charge that the conspiracy against them continued after the statute regarding countersignatures on title insurance policies was changed in 1979. After this statutory change, the South Dakota Attorney General held that the Division of Insurance, and not Defendant SDABE, had the authority to hold hearings to adopt a rule to fix the countersignature fee that could be charged by abstractors. According to Plaintiffs, Defendants opposed this ruling because they feared the Division of Insurance would set the fees too low and there would then be a widespread proliferation of title insurance throughout the state. To regain control for SDABE, SDLTA commenced litigation to attack the jurisdictional basis for the right of the Division of Insurance to set the countersignature fees. The

court disagreed, ruling that the Division of Insurance did have this authority.

While the *Fall River County Abstract Company, supra,* decision was pending on appeal, Plaintiffs charge that Defendants successfully lobbied the legislature to give the authority to establish a fee schedule to SDABE. This law, which amended SDCL 36-13-25,[2] became effective July 1, 1980. Another statute dealing with abstractor countersignatures was also enacted in 1980.[3] This statute declared that an abstractor's countersignature on a title insurance policy was a verification that the abstractor had performed a title search on the property involved.[4]

Plaintiffs charge that after all these legislative changes were made, Linderman experienced numerous problems obtaining countersignatures for title insurance policies issued outside of Pennington County. The Plaintiffs have claimed that abstractors sought to charge fifty percent of the policy premium for providing the counter-

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[2]The pertinent portion of SDCL 36-13-25 provides as follows: "[The Abstracters' Board of Examiners] shall also establish a schedule of fees and the requirements for an abstractor's services for countersigning insurance policies pursuant to § 58-25-16."

[3]The statute referred to is SDCL 36-13-26.1 which provides: "An abstractor's countersignature on a title insurance policy is verification that the abstractor has furnished the insurer a report based on the examination of recorded title and any other title information and services required by the insurer and § 36-13-25."

[4]One of the bases for the ruling in the *Fall River County Abstract Company* case was that South Dakota law did not require any affirmative act on the part of the abstractor countersigning the title insurance policy. Before the enactment of S.D.C.L. 36-13-26.1, there was no requirement that the abstractor search the title or do anything else before countersigning.

signatures. Plaintiffs have also charged that the various abstractors contacted about countersigning First American Title Company's title insurance policies communicated with other abstractors in the state to establish a fee schedule for countersignatures in the absence of any statute or regulation governing such fees. Plaintiffs charge that as a result of these legislative changes and the resulting problems First American Title Insurance Company had with obtainin countersignatures, Plaintiff First American Title Insurance Company was no longer able to exist financially and was dissolved in May, 1980.

In a nutshell, Plaintiffs allege that the activities of the Defendants were meant to harass and injure them. It is further claimed that this harassment allegedly led to the failure of First American Title Insurance Company and has obstructed Plaintiff First American Title Company from conducting title work in counties other than Pennington County.

All of the Defendants have cited three major areas of law in support of their opposition to Plaintiffs' allegations: The McCarran-Ferguson Act, 15 U. S. C. §§ 1101, *et seq.;* the Noerr-Pennington doctrine; and the so-called state action doctrine. In addition, Defendants SDABE and the state of South Dakota have alleged immunity under the eleventh amendment.

This Court will analyze each of these areas of the law as they apply to the eight allegations of Plaintiff's complaint.

McCARRAN-FERGUSON ACT

The McCarran-Ferguson Act[5] was passed in response

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[5]For the most part, this opinion will henceforth refer to the McCarran-Ferguson Act as simply the McCarran Act.

to the decision of the United States Supreme Court in *United States v. South-Eastern Underwriters Association,* 322 U. S. 533 (1944), in which it was held that Congress did not intend to exempt the business of insurance from the Sherman Act. The McCarran Act made the Sherman Act applicable to the business of insurance only to the extent insurance was not regulated by state law.[6]

The portions of the McCarran Act with which we are concerned in this case provide as follows:

> That after June 30, 1948, the Act . . . known as the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law. 15 U. S. C. § 1012(b).

However, 15 U. S. C. § 1013(b) provides:

> Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Defendants argue that the business of title insurance is part of the business of insurance, is regulated by the state of South Dakota and, therefore, this Court has no jurisdiction to consider those allegations in the complaint which concern the title insurance business. The allegations which Defendants argue are defeated by the McCarran Act are those which refer to the alleged fixing of prices for abstractor countersignatures on title insurance policies (¶21(a) of Plaintiffs' complaint), the enforcement of the statute requiring countersignatures on title insur-

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[6]For a more complete discussion of the history and development of the McCarran Act, see, *St. Paul Fire & Marine Insurance Co. v. Barry,* 438 U. S. 531, 538 (1978).

ance policies (¶21(e) of Plaintiffs' complaint,[7] the alleged attempt by Defendants to establish a fee schedule for abstractors' countersignatures (¶21(f) of Plaintiffs' complaint), and the enforcement of ARSD § 20:36:04:01 (¶21 (g) of Plaintiffs' complaint).[8]

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[7]Prior to July 1, 1979, S.D.C.L. 58-25-16 provided as follows: "No foreign insurance company shall issue any policy of title insurance or certificate of title or other guarantee of title, covering any property located within the state of South Dakota, unless the same is countersigned by a person, partnership or corporation, who has met the requirements of §§ 36-13-8 and 36-13-10 in the county in which the real property is located, or maintains an abstract plant in the county where the real property is located and meets the requirements of ch. 36-13. A violation of this section is a Class 2 misdemeanor." However, the 1979 legislature deleted the word "foreign" in the first sentence, thereby requiring all title insurance companies to obtain countersignatures on their policies.

[8]ARSD § 20:36:04:01 provides: "Before any person, firm, or corporation shall be entitled to a certificate of registration to engage in abstracting under the laws of South Dakota, he shall have an approved abstract plant containing the following: (1) a complete index showing every instrument recorded in the register of deeds' office in the county wherein he proposes to operate, properly listed against the specific property which it affects, and also a separate index showing all recorded instruments which do not affect specific property. This index may be compiled on cards, in bound books, or a looseleaf form, but must be made from an actual check of each page of each book of recorded instruments in said office, and in no case will a copy or film of the numerical index in the register's office be accepted; (2) in case a numerical index is used showing only the book and page of each instrument, then and in that case such index must be supplemented by a take-off of each instrument properly arranged in the said abstract plant so that it can be located from its own numerical index. Such take-off shall be sufficiently complete to show all essential parts of each instrument, such names, dates, descriptions, acknowledgements, filings, and any special or unusual recitals, covenants, warranties, exceptions or reservations. Such take-off may be made on

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In response, Plaintiffs contend that the conduct alleged in the complaint does not involve the business of insurance because none of the Defendants are insurers and because they are not regulated by the South Dakota Division of Insurance with respect to their abstracting activities. Plaintiffs further argue that the alleged actions of the Defendants are not regulated by the state of South Dakota and therefore, the McCarran Act is not applicable. Finally, Plaintiffs argue that the alleged activities of Defendants fall within the boycott, coercion or intimidation exception to the McCarran Act contained in 15 U. S. C. § 1013(b).

Whether or not title insurance is part of the business of insurance for purposes of the McCarran Act is considered in *Commander Leasing Company v. Transamerica Title Insurance Company*, 477 F. 2d 77 (10th Cir. 1973), and *Schwartz v. Commonwealth*, 374 F. Supp. 564 (E. D. Pa. 1974). In both these cases, the Plaintiffs argued that title insurance is unlike other insurance in that the major emphasis of title insurance is the title search rather than insuring against a potential loss. Because of this, it was argued that title insurance is not covered by the McCarran Act. Both courts disagreed. The *Schwartz* court commented:

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cards, on looseleaf form or in bound books or film; (3) if the form of index is a card, a looseleaf sheet, or the page of a bound book showing all instruments affecting a particular piece of farmland, or town lot or block, then such index must be in such form as to show all names, dates, acknowledgements, seals, and filings, and also a column to show any special or unusual recitals in each instrument.

> [I]t would be in our view unrealistic, indeed ostrich-like, to separate the title search process from the pure insurance aspect of the title companies' activities and, as plaintiffs urge, to call only the latter "the business of insurance." *Id.* at 574.

The requirement that title insurance policies be countersigned by an abstractor clearly falls within the business of insurance. Under present South Dakota law, abstractor countersignatures are an integral part of the business of title insurance in South Dakota. Therefore, as to Plaintiffs' allegation that Defendants have violated the Sherman Act by enforcing or attempting to enforce SDCL 58-25-16, it follows that this conduct is part of the business of insurance for McCarran Act purposes. However, as to the other allegations dealing with countersigning—that Defendants have conspired to fix the price for countersignatures and that they have conspired to attempt to establish a fee schedule for countersignatures—it would be stretching the McCarran Act beyond its intended purpose to hold that these allegations are part of the business of insurance. Although this Court has found that the countersignature requirement itself is included in the business of insurance, the decision of individual abstractors or Defendant SDABE as to what should be charged for this service is too far removed from the business of title insurance to warrant a McCarran Act exemption. The charge made for countersignatures is part of the business of abstracting, not title insurance.

The antitrust allegations in both *Commander Leasing, supra,* and *Schwartz, supra,* concerned charges made for certain services. However, both cases involved charges made by title insurance companies to either the buyer or seller of property. At issue in the allegations

in question are charges made by abstractors to a title insurance company.

This Court reaches the same conclusion with regard to Plaintiffs' allegation that the Sherman Act has been violated by Defendants' actions to enforce or attempt to enforce ARSD § 20:36:04:01. This regulation sets up requirements for abstract plants. This certainly cannot be considered to be part of the business of insurance. Although certain abstracting services which are performed in conjunction with the issuance of a title insurance policy are included within the business of insurance, not all abstracting activities can be considered part of the business of insurance. Certainly, requirements for abstract plants are not concerned with the business of insurance. Therefore, this Court finds that the McCarran Act does not bar the allegation contained in ¶21 (g) of Plaintiffs' complaint.

In light of this Court's determination that the countersignature requirement is part of the business of insurance for purposes of the McCarran Act, the next question is whether the alleged conduct of the Defendants is regulated by state law. In answer to this question it must be noted that the title insurance business is thoroughly regulated by South Dakota state law. SDCL 58-25.[9] Therefore, unless the allegation contained in ¶21 (e)

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[9]*See Lawyers Title Company of Missouri v. St. Paul Title Insurance Corporation*, 526 F. 2d 795 (8th Cir. 1975), *Commander Leasing, supra*, and *Swartz, supra*, which discuss the regulation of title insurance business in Missouri, Colorado, and Pennsylvania, respectively. It should also be noted that whether or not a state's regulation of insurance is effective is not relevant for McCarran Act purposes. *Seasongood v. K & K Insurance Agency*, 548 F. 2d 729 (8th Cir. 1977); *Lawyers Title Company, supra*.

of Plaintiffs' complaint[10] falls within the boycott, coercion or intimidation exception, the McCarran Act will deny this Court jurisdiction over this allegation.

In *St. Paul Fire & Marine Insurance Company v. Barry*, 431 U. S. 531, 536 (1978), the Supreme Court adopted the First Circuit Court of Appeals' definition of boycott, that being "[a] 'conserted refusal to deal' with a disfavored purchaser or seller." 555 F. 2d at 8. In regard to ¶21 (e) of Plaintiffs' complaint, this Court finds no facts which would cause this allegation to fall within the boycott exception. Although it is not necessary for the complaint to specifically allege a boycott in order to invoke the exception, *Ballard v. Blue Shield of Southern West Virginia, Inc.*, 543 F. 2d 1075 (4th Cir. 1976), this Court finds that nothing in this allegation even raises an issue of a boycott, coersion or intimidation.

Based on the foregoing, this Court concludes that ¶21 (e) of Plaintiffs' complaint is outside the jurisdiction of the Sherman Act under the authority of the McCarran Act.

Therefore, this Court will now ascertain whether the Sherman Act has been violated by the conduct alleged in ¶21 (a) of the complaint. ¶21 (f) of the complaint will be examined elsewhere in this opinion.

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[10]As noted, this paragraph concerns Plaintiffs' allegation that Defendants conspired to enforce or attempt to enforce S.D.C.L. 58-25-16. There is a question about whether Defendants have any connection with the enforcement of this statute. The statute makes it a Class 2 misdemeanor to violate its provisions. It would appear that the duty to enforce a statute rests with the various states attorneys of South Dakota. However, due to this Court's determination regarding the McCarran Act (infra), further discussion of this issue is not required.

The conduct of the individual abstractor Defendants with respect to the allegations of price fixing contained in ¶21 (a) does not violate 15 U. S. C. § 1 or § 2.

The Plaintiffs have claimed that the individual abstractor defendants conspired to fix prices by setting the abstractor's countersignature fee at fifty percent of the title insurance premium. This Court has spent a considerable amount of time examining the evidence introduced on the allegation of conspiracy to fix prices. Initially, this Court found no direct evidence of any formal agreement between the defendant abstractors. However, such a finding is not fatal to the Plaintiffs' allegation of conspiracy. In cases where conspiracy is claimed it is rare that a plaintiff can ever show or produce direct evidence of an agreement to fix prices. *American Tobacco Co. v. U. S.*, 328 U. S. at 810; *Milgram v. Loew's, Inc.*, 192 F. 2d 579 (3rd Cir. 1951), *cert. denied* 343 U. S. 929 (1952). Accordingly, this Court has closely examined the evidence concerning the dealings between Plaintiffs and the abstractor Defendants.

From such examination this Court does not find that the Plaintiffs have proved the presence of a conspiracy. It appears to this Court that, at the most, the actions of the individual abstractors may have constituted parallel action. The Eighth Circuit Court of Appeals in *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F. 2d 877 (8th Cir. 1978), noted that, ". . . similar practices by competitors, *i. e.*, 'conscious parallelism', will sometimes support an inference of an agreement." *Id.* at 884. Generally, however, mere conscious parallelism is not enough to support a finding of conspiracy.

The Eighth Circuit Court of Appeals, in *Admiral Theatre Corp. v. Douglas Theatre Co., supra*, noted *Theatre Enterprises v. Paramount Film D. Corp.*, 346 U.S. 537 (1954) where the Supreme Court said, "Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely." *Id.* at 541. In this case, the Plaintiffs must be able to show, through additional facts, that the conscious parallel actions of the alleged conspirators were concerted and interdependent. *Levitch v. Columbia Broadcasting System, Inc.*, 495 F. Supp. 649, 674 (S.D.N.Y. 1980); *National Auto Brokers v. General Motors Corp.*, 572 F. 2d 953 (2nd Cir. 1978), *cert. denied* 439 U.S. 1072 (1979); *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F. 2d 1036, 1042-43 (2nd Cir. 1976) *cert. denied* 429 U.S. 885 (1976). This Court should be able to find that the Defendants' actions were made in the ". . . collective self-interest of the conspirators rather than, or in addition to, their individual self interest." *Levitch v. Columbia Broadcasting System, Inc.*, 495 F. Supp. at 675. In *Admiral Theatre Corp. v. Douglas Theatre Co.*, the Eighth Circuit Court of Appeals, when considering when parallel action may be used to properly infer an agreement stated, "Only where the pattern of action undertaken is inconsistent with the self-interest of the individual actors, were they acting alone, may an agreement be inferred solely from such parallel action." *Id.* at 884. After having considered the evidence in light of the law as applied to parallel action, this Court is unable to find the presence of conspiracy. Plaintiffs have been unable to show that the Defendants' actions were more consistent with con-

spiracy to fix prices than with individual business decisions. Additionally, Plaintiffs have been unable to elicit sufficient evidence to prove that the Defendants' actions were interdependent or concerted. Thus, the indication of possible parallel action, without more, does not allow this Court to properly infer conspiracy.

A review of the evidence indicates that, while the initial countersignature fees charged by the abstractor defendants tended to be fifty percent of the title insurance premium, the fees generally varied from five to fifty percent of the title insurance premium. It appears that Defendant Eddie Clay, owner of the Fall River County Abstract Company, agreed with Walter Linderman to charge a fee of thirty-five percent of the premium. (Testimony of Walter J. Linderman, trial transcript pp. 299, 300.) Mr. Linderman's testimony also indicates that in October, 1980, he voluntarily paid Defendant Dennis O. Murray a higher countersignature fee than Mr. Murray had been charging. In his letter to Mr. Murray dated October 31, 1980, Mr. Linderman stated that he thought the fee was fifty percent. (Mr. Linderman's testimony, trial transcript p. 321, trial exhibit #156.) Furthermore Mr. Dale Morman, an attorney practicing in Sturgis, South Dakota, testified that, in a meeting with Defendant Glen Rhodes on August 1, 1979, Mr. Linderman offered to pay a fifty percent countersignature fee to Mr. Rhodes for countersigning title insurance policies. (Testimony of Dale Morman, trial transcript, p. 360.) On direct examination Mr. Linderman said Mr. Rhodes had asked for a fifty percent fee. (Trial transcript, p. 90.) However, in his cross-examination testimony concerning the meeting, Mr. Linderman could not recall who proposed the

fifty percent fee. Mr. Linderman did claim that he did not propose the fifty percent fee. (Trial transcript, pp. 325, 326.) Such evidence is equivocal and is not sufficient to meet Plaintiffs' burden of proof concerning the allegations of conspiracy to fix prices contained in ¶21 (a) of the complaint.

The Plaintiffs' evidence concerning price fixing by Defendant Betty Gould of Custer, South Dakota, is typical of the Plaintiffs' inability to clearly meet their burden of proof on the price fixing allegation. In their proposed finding #73 the Plaintiffs ask this Court to find that on July 29, 1979, Betty Gould refused to sign a title insurance policy, tendered to her by Mr. Linderman, because she did not want to sign the policy until she had discussed the matter with other abstractors. Such a finding would misstate the record. This Court is unable to find, either in the transcript or in the deposition of Betty Gould, where Defendant Gould stated that she needed to talk with other abstractors. It appears that, at the most, she may have used the term "others". Further examination of the transcript of her deposition would indicate that the "others" Betty Gould spoke with, prior to signing the policy, were her attorney, a Mr. Baldwin, her insurance agent and her errors and omissions policy carrier. (Walter Linderman testimony, trial transcript, pp. 95, 298.) (Deposition of Betty J. Gould, 12-10-80, pp. 38, 40, 48 and 49.) This Court cannot find that the term "others" as it may have been used by Betty Gould, clearly included the other defendants in this action. The Plaintiffs have simply failed to introduce sufficient evidence to meet their burden of proof. Accordingly, this Court finds that, with regard to the conduct complained of in ¶21 (a) of the

complaint, the Defendants are not liable to Plaintiffs under 15 U. S. C. § 1 or §2.

NOERR-PENNINGTON DOCTRINE

Defendants also urge that the Noerr-Pennington Doctrine bars portions of Plaintiffs' complaint. The Noerr-Pennington Doctrine had its birth in *Eastern RR Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961). The gist of the complaint in that case was that the petitioners had violated the Sherman Act by orchestrating a publicity campaign against the respondents designed to foster the adoption and retention of laws damaging to the trucking industry. Although the court found that petitioners' motive was to destroy respondents as competitors, it was held, on the basis of the first amendment, that this fact could not transform the lawful action of petitioning the government into a Sherman Act violation. The decision in *Noerr* was expanded upon in *United Mine Workers v. Pennington*, 381 U. S. 657 (1965), wherein the court stated:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. *Id.* at 670.

Although *Noerr* and *Pennington* only spoke in terms of approaches to legislative bodies, the rule established in those cases was extended to requests for relief made to administrative agencies and courts in *California Motor Transport Company v. Trucking Unlimited*, 404 U. S. 508 (1972).

Like most legal doctrines, there is an exception to the Noerr-Pennington Doctrine. This exception was first

noted in *Noerr* where the court indicated that a campaign which is a mere sham to cover what is nothing more than an attempt to interfere with another's business relationships is not shielded from the Sherman Act by the first amendment. The "sham exception" was further developed in *California Motor Transport,* wherein the court held that the Sherman Act proscribed the conduct of the petitioners who had sought to bar their competitors from meaningful access to adjudicatory tribunals and to usurp the decision-making process. From a study of both *Noerr* and *California Motor Transport,* it follows that the sham exception would encompass lobbying or litigation efforts which are solely directed toward either interfering with another's business interests or are directed toward seeking to bar another from meaningful access to adjudicatory tribunals.

Defendants claim that several of Plaintiffs' allegations are barred by the Noerr-Pennington Doctrine, including: the allegation the Defendants conspired to engage in sham litigation by appealing the decision to grant a certificate of authority to First American Title Insurance Company (¶21 (b) of Plaintiffs' complaint); the allegation the Defendants conspired to engage in sham litigation by participating in the *Fall River County Abstract Company v. Knutson* case (¶21 (c) of Plaintiffs' complaint); the allegation the Defendants conspired to engage in efforts to influence the enactment of S. L. 1979, ch. 345, amending SDCL 58-25-16 (¶21 (d) of Plaintiffs' complaint); and the allegation the Defendants conspired to engage in a publicity campaign directed toward interfering with Plaintiffs' business relationships, (¶21 (h) of Plaintiff's complaint).

This Court will first address Defendants' alleged activities to influence the enactment of S. L. 1979, ch. 345, which amended SDCL 58-25-16. Plaintiffs claim that these efforts were part of a larger scheme to monopolize and restrain trade in the abstracting business. Nonetheless, this activity falls squarely within the confines of the Noerr-Pennington Doctrine. The *Noerr* court stated:

> The right of people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. *Id.* at 139.

It should also be noted the Defendants were successful in their lobbying efforts. They went to the legislature with a proposal and the legislature adopted this proposal. This is a classic case of a group of persons petitioning their government for relief and receiving the relief they request. Such activity is protected from the Sherman Act. *See Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers,* 542 F. 2d 1076 (9th Cir. 1976); *Central Bank of Clayton v. Clayton Bank,* 424 F. Supp. 163 (E. D. Mo. 1976), *aff'd* 553 F. 2d 102 (8th Cir. 1977), *cert. denied* 433 U. S. 910 (1977). The fact Defendants obtained the relief they were seeking from the legislature indicates that their efforts were directed toward that end and were not a sham. There is no evidence that Defendants' activities to amend SDCL 58-25-16 were a mere sham to cover attempts to interfere with Plaintiffs' business activities.

The same reasoning can be applied to Defendants' participation in the *Fall River County Abstract Company v. Knutson* case. As noted earlier, this case involved the question of who was the proper party to establish a fee schedule for countersigning of title insurance policies by abstractors. The South Dakota Attorney General ruled in 1979 that the Division of Insurance, rather than Defendant SDABE, should perform this task. Defendants Fall River County Abstract Company and SDLTA then brought suit seeking a Writ of Prohibition to prohibit the Director of Insurance from establishing these fees. Plaintiff First American Title Insurance Company intervened as a defendant. Defendants Fall River County Abstract Company and SDLTA were unsuccessful in their litigation. The court ruled that the Director of Insurance should proceed to establish a fee schedule for countersignatures.[11]

Plaintiffs allege that the purpose of this litigation was to harass and competitively injure them. This Court, however, has read the pleadings, affidavits and depositions, has heard the testimony and reviewed the evidence in the trial of this matter, and has searched the opinion in the *Fall River County Abstract Company* case. The record shows that Defendants participated in the litigation in question for the express purpose of achieving the result which they claimed they were seeking. As with the lobbying activities noted above, the relief the Defendants unsuccessfully sought in the *Fall River County Abstract Co.* case was eventually obtained through legis-

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[11]This ruling was rendered ineffective in 1980 when SDCL 36-13-25 was amended to allow SDABE to establish the fee schedule for countersignatures.

lation. This tends to indicate that the case was not a sham. *Subscription Television, Inc. v. Southern California Theatre Owners Ass'n*, 576 F. 2d 230 (9th Cir. 1978); *Central Bank of Clayton, supra.*

Since this Court finds no factual basis to support Plaintiffs' claim that the Defendants' participation in this lawsuit was a sham, the Noerr-Pennington Doctrine also governs.

Another allegation which Defendants claim is barred by Noerr-Pennington refers to Defendants' alleged publicity campaign. (¶21(h) of Plaintiffs' complaint). Plaintiffs charge that Defendants participated in a publicity campaign which was ostensibly directed toward influencing governmental action, but which was in fact, a mere sham to cover an attempt to interfere with Plaintiffs' business relationships.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U. S. at 144, the Court stated that:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

Having reviewed the trial transcript and the trial exhibits, this Court is unable to find any evidence of a "publicity campaign" that is not encompassed by the allegations contained in paragraphs 21(b), (c) and (d) of the complaint. Nor can this Court find any reference to such a "publicity campaign" in the post-trial material submitted by parties.

Furthermore, because, as stated elsewhere in this opinion, this Court has found that any such "publicity campaigns" were directed towards influencing governmental action and were not merely a sham to cover attempts to interfere with Plaintiffs' business relationships, this Court finds that the allegations set forth in ¶21(h) are redundant and do not properly state a claim that entitles Plaintiffs to relief under the Sherman Act.

Such finding leaves only Plaintiffs' allegation that Defendants' opposition to First American Title Insurance Company's application for a certificate of authority was a sham proceeding. In this regard, the language of *California Motor Transport, supra,* must again be examined. In that case, the Supreme Court stated:

> One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. *Id.* at 513.

Since we are now concerned with only a single lawsuit, the question arises whether a single lawsuit can ever constitute a sham within the exception to the Noerr-Pennington Doctrine. The Supreme Court addressed this issue in *Vendo Company v. Lektro-Vend Corp.,* 433 U. S. 623 (1977), but established no clear precedent. In a concurring opinion, Justice Blackmun, joined by Chief Justice Burger, indicated that *California Motor Transport* stands for the proposition that a single court proceeding cannot be the basis of an exception to the Noerr-Pennington Doctrine. On the other hand, Justice Stevens, joined by Justices Brennan, White and Marshall, stated that a single suit could be the basis of an antitrust violation.

A number of lower courts have also addressed the issue and have reached conflicting results. In *Raemco, Inc. v. Allegheny Airlines*, 496 F. Supp. 546 (S. D. N. Y. 1980), and *Mountain Grove Cemetery v. Norwalk Vault Co.*, 428 F. Supp. 951 (D. Conn. 1977), it was held that a single lawsuit was not sufficient evidence of a sham so as to fall within the Noerr-Pennington exception. The opposite result has been reached in other courts. *See Feminist Women's Health Center, Inc. v. Mohammad*, 586 F. 2d 530 (5th Cir. 1978) *cert. denied* 444 U. S. 924 (1979); *Technicon Medical Information Systems Corp. v. Green Bay Packaging, Inc.*, 480 F. Supp. 124 (E. D. Wis. 1979); *Colorado Petroleum Marketers Ass'n v. Southland Corp.*, 476 F. Supp. 373 (D. Colo. 1979). Two district courts in the Eighth Circuit have addressed this issue and have reached conflicting results. In *Central Bank of Clayton, supra*, in finding there was no sham, the court emphasized that only one lawsuit was brought. *Id.* at 167.[12] A different opinion was expressed in *First National Bank of Omaha v. Marquette National Bank of Minneapolis*, 482 F. Supp. 514 (D. Minn. 1979), wherein the court concluded that in some cases one lawsuit could be sufficient to bring a defendant's conduct within the sham exception to the Noerr-Pennington Doctrine. *Id.* at 520.

This Court agrees with the Minnesota District Court that in some instances one lawsuit can be sufficient to come within Noerr-Pennington's sham exception. If a lawsuit is filed solely to interfere with another's business relation-

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[12]This case was affirmed by the Eighth Circuit Court of Appeals without opinion, so the court did not specifically address the issue in question.

ships or to deny another access to a tribunal, it should not be necessary that a second, third, fourth or fifth lawsuit be filed before this conduct is considered a sham. A statement from *Colorado Petroleum, supra,* seems eminently reasonable:

> I am not convinced that the court intended to give every dog one free bite, thus making it an irrebutable presumption that the first lawsuit was not a sham regardless of overwhelming evidence indicating otherwise. . . . Although the frequency of litigation is a probative factor in a putatively sham litigation situation, it is not by any means determinative. *Id.* at 378-79.

In light of this Court's determination that one lawsuit can be a sham for Noerr-Pennington purposes, this Court must now determine whether the appeal of the Insurance Commissioner's decision was the type of conduct which falls within the meaning and scope of the sham exception.

The Fifth Circuit, in *Feminist Women's Health Center, Inc. v. Mohammad, supra* at 543, has stated that the test for a sham exception is, "[w]hether the conduct was genuinely intended to influence a government employee to take official action in his [official] capacity. . . ." The Ninth Circuit, in *Franchise Realty, supra,* at 1081, concluded the scope of the sham exception, ". . . is limited to situations where the defendant is not seeking official action by a governmental body, so that the activities complained of are 'nothing more' than an attempt to interfere with the business relationships of a competitor. . . ." Thus, it appears that this Court must divine the Defendants' intent in appealing the decision of the Director of Insurance. In evaluating intent, it is necessary to distinguish anticompetitive intent from the intent to interfere with

business relationships. In analyzing activities that fall within the sham exception to the Noerr-Pennington Doctrine, the District of Columbia Circuit Court stated in *Federal Prescription Services v. American Pharmaceutical Ass'n*, 663 F. 2d 253, 263 (D. C. Cir. 1981):

> Anticompetitive intent alone is not enough. Nor is it sufficient that the persons engaged in lobbying activity also engaged in "a pattern of actions." Both factors were present in *Noerr*, in which the Court held the complained of activities were beyond the scope of the antitrust laws. What is needed in addition is proof that the lobbyists subverted the integrity of the governmental process, that they effectively barred Federal's [plaintiff's] access to these processes, or that the nature of these processes made their invocation something other than the "political activity," that was recognized by the *Noerr-Pennington-Trucking Unlimited* line of cases to be beyond the scope of the Sherman Act.

In the present case, little evidence supports Plaintiffs' claim that the Defendants have in any way barred Plaintiffs' access to governmental process. Certainly Plaintiffs cannot claim they were denied access to the Director of Insurance's decision-making process. Nor can Plaintiffs claim they were denied access to the judicial process upon Defendants' appeal of the decision of the Director of Insurance. Additionally, this Court cannot find that Defendants' conduct constituted, "something other than the 'poitical activity,' that was recognized by the *Noerr-Pennington-Trucking Unlimited* line of cases to be beyond the scope of the Sherman Act." *Id.*

The fact that Defendants' opposition to the issuance of a certificate of authority by the Director of Insurance was unsuccessful is not and should not be determinative

of intent. In a memorandum decision dated January 10, 1979, Judge Robert Miller of the South Dakota Sixth Judicial Circuit affirmed the decision of the Director of Insurance, finding that the Director's determinations were supported by the record as a whole. Judge Miller also found that several of the issues raised by the appeal were outside the jurisdiction of the Director and thus the Director's refusal to rule on those issues was proper. This Court has been unable to find any statement in Judge Miller's memorandum opinion that would indicate that the appeal of the Director's decision was a sham or was frivolously made in order to interfere with Plaintiffs' business relationships. It appears to this Court that Defendants intended to and did make a genuine effort to influence an official administrative decision and, when unsuccessful in those efforts, Defendants made a genuine effort to seek judicial review of the Director's decision. Such a finding does not mean that Plaintiffs have not been injured in some way as an incidental effect of Defendants' efforts. The Sherman Act, however, does not proscribe such incidental effects because, as the Court stated in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U. S. at 143:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of the campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

The Court then concluded that such campaigns had not been outlawed by the Sherman Act. *Id.* at 144. The Court's analysis of the basic nature of the case in *Noerr* is relevant to the present case:

> . . . A "no-holds-barred fight" [footnote omitted] between two industries both of which are seeking control of a profitable source of income. [Footnote omitted.] Inherent in such fights, which are commonplace in the halls of legislative bodies, is the possibility, that one group or the other will get hurt by the arguments that are made. In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system. . . . *Id.*

In conclusion, this Court finds that the allegations contained in ¶¶21(b), (c), (d), and (h) of Plaintiffs' complaint are barred by the Noerr-Pennington Doctrine.[13]

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[13]It has been stated where there is official participation in an anti-competitive lobbying scheme meant to restrain trade, Noerr-Pennington is not applicable. *Duke & Company, Inc. v. Foerster,* 521 F. 2d 1277 (3rd Cir. 1975). Because SDABE a state agency, is a party and because all of Plaintiffs' allegations are directed toward all the Defendants, it might be argued that Noerr-Pennington is inapplicable because it is alleged there is official participation in the lobbying and litigation efforts discussed above. This Court does not find that any of Plaintiffs' allegations which it has found barred by Noerr-Pennington involve the degree of official participation necessary under the decision in *Foerster,* and other similar cases.

STATE ACTION DOCTRINE

The so-called state action doctrine was formulated by the Supreme Court in *Parker v. Brown,* 317 U.S. 341

(1943), in which it was held that Congress did not intend the Sherman Act to apply to state action. The Court stated: "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. The Supreme Court did not address the state action doctrine for thirty years until it decided the case of *Goldfarb v. Virginia State bar*, 421 U. S. 773 (1975), which ruled on the use of minimum fee schedules for attorneys. Since that time, several Supreme Court decisions have considered this doctrine. *See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U. S. 97 (1980); *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U. S. 389 (1978); *Bates v. State Bar of Arizona*, 433 U. S. 350 (1970); *Cantor v. Detroit Edison Company*, 428 U. S. 366 (1976).[14]

In *Midcal, supra*, the Supreme Court established standards for antitrust immunity under *Parker*.[15] These standards were stated as follows: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy;' second, the policy must be 'actively supervised' by the State itself." The Eighth Circuit Court of Appeals also studied the state action doctrine and discussed when it should be applied. In *Sound*,

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[14]For a more complete discussion of the development of the state action doctrine and a closer look at the cases interpreting it, see, *Sound, Inc. v. American Telephone & Telegraph Company*, 631 F. 2d 1324, 1332-34 (8th Cir. 1980).

[15]Actually *Parker, supra*, did not establish an immunity under the antitrust laws, but instead, established a limitation on the scope of these laws. However, this Court, like most others, will make use of the term immunity.

Inc. v. American Telephone & Telegraph Company, 631 F. 2d 1324 (8th Cir. 1980), the Court held that the following factors were relevant in determining whether the state action doctrine should be applied:

> [t]he existence and nature of any relevant statutorily expressed policy; the nature of the regulatory agency's interpretation and application of its enabling statute, including the accommodation of competition by the regulator; the fairness of subjecting a regulated private defendant to the mandates of antitrust laws; and the nature and extent of the State's interest in the specific subject of the challenged activity. *Id.* at 1334.

Defendants argue that Plaintiffs' allegations concerning fixing the price of abstractor countersignatures and enforcing countersignature and title plant requirements are covered by the *Parker* case.[16] They assert that state policy regarding these subjects is clearly articulated in SDCL 36-13 and 58-25 and that these subjects are actively supervised by the state.

Plaintiffs argue that a state agency, SDABE, is involved in the conspiracy, and thus, the state action doctrine should not be applicable. There is some support for this position. In *Duke & Company v. Foerster*, 521 F. 2d 1277 (3rd Cir. 1975), the court stated:

> After *Goldfarb* . . . it is clear that when there is an allegation of governmental participation in such a combination to the benefit or detriment of private par-

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[16]The allegations which Defendants contend would be immune under *Parker* are those contained in ¶¶ 21(e), (f), and (g). Although this Court has already determined that the allegation in ¶ 21(e) is barred by the McCarran-Ferguson Act, the effect of *Parker* on this allegation will also be discussed.

ties, and when the activities of the public body are not compelled by the state acting as a sovereign, a claim has been stated under the antitrust laws. *Id.* at 1282. *See also Lafayette, supra; Kurek v. Pleasure Driveway and Park District of Peoria, Ill.*, 557 F. 2d 580 (7th Cir. 1977), *vacated* and *remanded* 435 U. S. 389, *aff'd* 583 F. 2d 378 (7th Cir. 1978), *cert. denied* 439 U. S. 1098 (1979).

As noted earlier, Plaintiffs have alleged, in ¶ 21(g) of the complaint, that Defendants conspired to enforce and attempted to enforce ARSD § 20:36:04:01 and that this regulation is illegal and anticompetitive as applied to Plaintiffs. This regulation was adopted by the SDABE pursuant to SDCL 36-13-10 and 36-13-6. SDCL 36-13-10 specifically authorizes the SDABE to promulgate rules and regulations for the establishment of abstract plants. If, as Plaintiffs allege, the regulation was enacted by SDABE in order to specifically prevent Plaintiffs from establishing abstract plants in counties other than Pennington County, then this would appear to be the kind of government action that would preclude the application of the state action doctrine. However, if the regulation was adopted in an effort to promote the public welfare and in furtherance of a statutorily expressed public policy, then the state action doctrine will bar Plaintiffs' action concerning ARSD § 20:36:04:01. Thus, this Court must determine whether the tests set out by the Supreme Court in *Midcal, supra,* and by the Eighth Circuit Court of Appeals in *Sound, Inc., supra,* have been met.

The SDABE was created by the State Legislature by the enactment of SDCL 36-13. The composition of the board and the requisite qualifications of its members were determined by the State Legislature in SDCL 36-13-1. The

duties of the SDABE were established in SDCL 36-13-6 and include carrying out the purposes and enforcing the provisions of the chapter. SDCL 36-13-6 also clearly requires the SDABE to, ". . . make such rules and regulations as may be necessary to carry out the purposes of this chapter." *Id.* SDCL 36-13-6 also requires the Board to comply with the state Administrative Procedures Act when making rules and regulations. Additionally, SDCL 36-13-8 and 36-13-10 specifically refer to the Board's rule-making authority.

The South Dakota Legislature, in SDCL 36-13-10, has clearly expressed state policy concerning the need for a person engaging in the business of abstracting to have an abstract plant. That statute also indicates the state's interest in having such abstract plants contain sufficient information to show, ". . . all instruments affecting the title to real estate which are of record or on file in the office of the registrar of deeds of each county. . . ." *Id.* SDCL 36-13, taken as a whole, clearly indicates the state's policy requiring the regulation of the business of abstracting.

The South Dakota Supreme Court, in *Siefkes v. Clark Title Company,* 215 N. W. 2d 648, 652 (S. D. 1974), recognized the state's interest in regulating the business of abstracting. The Court therein stated that, "[b]ecause the abstractor's product is an indispensable part of real property transfers and due to the reliance which must necessarily be placed upon it by the vendor and vendee alike, the legislature has properly exercised its police power by the enactment of SDCL 36-13." *Id.*

ARSD § 20:36:04:01, the regulation complained of in ¶21(g) of the complaint, further implements state policy

and clarifies the statutory language of SDCL 36-13-10. The statute requires, ". . . indexes or other records showing in a *sufficiently comprehensive form,* all instruments affecting title. . . ." *Id.* [Emphasis added.] The requirements set out in the regulation that Plaintiffs have complained of have the effect of increasing the accuracy of abstract plant records. Such a result clearly supports the state's policy of regulating abstractors. Nor does the SDABE's interpretation and application of its enabling statutes, regarding the enactment of ARSD § 20:36:04:01, appear unreasonable or strained.

While this regulation might increase the amount of work required to construct an abstract plant or prepare one for sale or transfer, such a burden falls on anyone wishing to purchase or construct an abstract plant in South Dakota and not just on Plaintiffs.

It also appears, from the depositions of Arthur Johnson, at page 12 and Barbara Mann, at pages 11 and 42, that especially since 1975 the state's policies concerning abstract plants have been actively enforced. Since 1975 approximately 20 to 25 new and existing abstract plants have been examined by the SDABE pursuant to regulations promulgated by the Board.

In *Fed. Prescription Service v. American Pharmaceutical Ass'n, supra,* Plaintiffs alleged that the Iowa State Board of Pharmacy Examiners had conspired with, among others, the Iowa State Pharmaceutical Association. As in the present case, the Iowa Board of Pharmaceutical Examiners was, by statute, composed of pharmacists who were members of the State Pharmaceutical Association. It was also possible to argue that some of the Iowa Board's

actions were taken to competitively injure the Plaintiffs. The Board could also have taken the same actions believing them to be for the public good. A similar problem is raised by the arguments in the present case. The District of Columbia Circuit Court of Appeals applied the following analysis:

> Accepting as true that the board members acted in conformance with American's economic goals rather than solely in selfless dedication to the public good, we decline, given the availability of a better explanation for their conduct, to treat that parallel conduct as significant probative evidence of an unlawful conspiracy with American. Although parallel behavior may support an inference of conspiracy when the alleged coconspirators have acted in a way inconsistent with independent pursuit of economic self-interest, that inference is warranted only when a theory of rational, independent action is less attractive than that of concerted action. [Citations omitted.] The behavior of the Iowa Board in this case is not the kind that could only make sense in the context of the behavior of others; rather, it can be persuasively explained by the exercise of rational, independent judgment. If we take as true Federal's claim that the Board was dominated by community pharmacists pursuing commercial self-interest, then the Board's action in attempting to hinder Federal's operation is explained as simply an effort to serve the economic interests of the Board members and their professional peers. If instead Federal is wrong and the Board was actually seeking in good faith to advance the public interest, the inference that it unlawfully conspired with American is weaker yet. We thus conclude that the most convincing explanations of the Board's conduct do not support the theory that Board members were participants in an unlawful conspiracy with American. ***Federal Prescription Service v. American Pharmaceutical Ass'n,*** **663 F. 2d at 267.**

The Plaintiffs have also claimed that the SDABE is the "alter ego" of SDLTA and thus the actions of the SDABE should not be subject to the state action doctrine. In support of this argument, Plaintiffs note that three of the four members of the SDABE were also members of the SDLTA. While this Court understands Plaintiffs claim that the overlapping membership between SDABE and SDLTA should be probative of a conspiracy, given the facts of this case, this Court concludes "mere membership in associations is not enough to establish participation in a conspiracy with other members of those associations. . . ." *Id.* at 265.

The SDABE was established by SDCL 36-13. The statute provides that of the four members of the Board, three will be active abstractors. Currently, SDCL 36-13-1 requires two of the three abstractor members to be members of SDLTA. Thus, the composition of the SDABE has been determined by state law and any changes that should be made are a matter for the state legislature. Any such changes should not be made by this Court applying the Sherman Act as a substitute for the proper political process.

Further, the Plaintiffs have been unable to show that SDABE and SDLTA engaged in a conspiracy resulting in the enactment of ARSD § 20:36:04:01. Plaintiffs have been unable to show that the SDABE violated SDCL 36-13-6 or SDCL 1-26 when ARSD § 20:36:04:01 was enacted. Instead, the evidence shows that SDABE complied with the requirements of the South Dakota Administrative Procedures Act when enacting the ARSD § 20:36:04:01.

Finally, Plaintiffs have not shown that their theory of the reason for the enactment of ARSD § 20:36:04:01 is

more plausible than the Defendants' explanation. Thus, as did the District of Columbia Circuit Court in *Federal Prescription Service, supra,* this Court must, "conclude that the most convincing explanations of the Board's conduct do not support the theory that the Board members were participants in an unlawful conspiracy. . . ." *Id.* at 268.

Thus, when all of the evidence is analyzed in accordance with the factors set out by the Eighth Circuit Court of Appeals in *Sound, Inc. v. American Telephone and Telegraph Company, supra,* and considering the analysis of the D. C. Circuit Court of Appeals in *Federal Prescription Service,* this Court finds that the state action doctrine precludes the application of the Sherman Act to the actions complained of in ¶21(g) of the Plaintiffs' complaint.

This same reasoning applies to the allegations concerning the establishment of fees for countersignatures on title insurance policies (¶21(f) of Plaintiffs' complaint.) The South Dakota State Legislature has declared that countersignatures are required on title insurance policies, SDCL 58-25-16, and that the SDABE is to, ". . . establish a schedule of fees . . . for an abstractor's services for countersigning title insurance policies pursuant to § 58-25-16." SDCL 36-13-25. This Court finds these statutes to be a clear expression of state policy. The South Dakota Supreme Court has also recognized that the legislature is concerned with price regulation of the abstracting business. *Siefkes v. Clark Title Company, supra.* It also appears to this Court that the statutorily expressed policy concerning the establishment of fee schedules by the SDABE and the requirement of countersignatures on title

insurance policies, has been actively enforced. The SDABE filed rules concerning countersignature requirements with the South Dakota Secretary of State on July 12, 1981. While the SDABE has not established a fee schedule for countersignatures of title insurance policies, it has held informational hearings regarding such fees in the cities of Aberdeen, Mitchell and Rapid City, South Dakota. These meetings were held in March and April of 1981. (Deposition of Barbara Mann, p. 223; Trial Exhibit 86.) Having reviewed the actions taken by the SDABE pursuant to SDCL 58-25-16 and SDCL 36-13-25, this Court can find no fault with the SDABE's interpretation of the enabling statutes. Nor can this Court, when reviewing the evidence as a whole, find that the SDABE participated in a scheme specifically designed to damage Plaintiffs' business interests. Thus, considering both the *Midcal* test and the factors set out by the Eighth Circuit Court of Appeals in *Sound, Inc., supra,* this Court concludes that the state action doctrine bars ¶21(f) of Plaintiffs' complaint.

One remaining allegation which Defendants claim is barred by the state action doctrine concerns the enforcement and attempts to enforce SDCL 58-25-16. (¶21(e) of Plaintiffs' complaint.) The challenged restraint, namely the requirement that title insurance policies be signed by abstractors, is "clearly articulated and affirmatively expressed as state policy." The legislature clearly stated in SDCL 58-25-16 that title insurance policies should be countersigned. It also appears that the statute itself indicates that this particular alleged restraint is "actively supervised" by the state. Applying the standards articulated in *Midcal* and *Sound, Inc.*, this Court concludes that the alle-

gation in ¶21(e) is also barred by the state action doctrine.

Defendants SDABE and State of South Dakota finally argue that they are immune from this suit under the eleventh amendment,[17] citing as authority *Quern v. Jordan*, 440 U. S. 332 (1979) and *Edelman v. Jordan*, 415 U. S. 651 (1974). Because this action has been resolved without reaching Defendants' eleventh amendment argument, that question will not be addressed by the Court.

CONCLUSION

In summary, this Court has determined the following:

(1) The allegations contained in ¶21(e) of Plaintiffs' complaint are barred by the McCarran-Ferguson Act.

(2) The allegations contained in ¶¶21(b), (c), (d), and (h) of Plaintiffs' complaint are barred by the first amendment and the Noerr-Pennington Doctrine.

(3) The allegations contained in ¶¶21(e), (f), and (g) of Plaintiffs' complaint are barred by the state action doctrine.

(4) The Defendants are not liable to the Plaintiffs for the conduct alleged in ¶21(a) of Plaintiffs' complaint

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[17]The eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

for the reason that the Plaintiffs have not by sufficient evidence established the conspiracy alleged.

The above constitutes this Court's findings of fact and conclusions of law in this matter.

BY THE COURT:

/s/ Andrew W. Bogue, Chief Judge
United States District Court